(1)

No. 94-6615-CFH
Status: GRANTED

Title: Carl Thompson, Petitioner
v.
Patrick Keohane, Warden, et al.

Docketed:
October 31, 1994

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Thompson,Carl, O'Sullivan,Julie R.

Counsel for respondent: Hora,Cynthia M.

Entry	Date	Note	Proceedings and Orders
13	Oct 12 1994	G	Motion of petitioner for appointment of counsel filed.
1	Oct 31 1994	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Nov 21 1994		Waiver of right of respondents Patrick Keohane, et al. to respond filed.
3	Nov 23 1994		DISTRIBUTED. December 9, 1994 (Page 11)
5	Dec 1 1994	P	Response requested -- SB. (Due January 3, 1995)
6	Dec 8 1994		Brief of respondents Patrick Keohane, et al. in opposition filed.
8	Dec 21 1994	X	Reply brief of petitioner filed.
7	Dec 29 1994		REDISTRIBUTED. January 13, 1995 (Page 12)
10	Jan 17 1995		REDISTRIBUTED. January 20, 1995 (Page 17)
12	Jan 23 1995		Petition GRANTED.
			**********
14	Jan 26 1995		Motion for appointment of counsel GRANTED and it is ordered that Julie R. O'Sullivan, Esq., of Washington, D. C., is appointed to serve as counsel for the petitioner in this case.
16	Jan 27 1995		Order extending time to file brief of petitioner on the merits until April 12, 1995.
17	Feb 2 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Ninth Circuit.
18	Feb 2 1995		Record filed.
		*	Original record proceedings United States District Court for the District of Alaska.
19	Apr 12 1995		Joint appendix filed.
20	Apr 12 1995		Brief of petitioner Carl Thompson filed.
21	May 10 1995		Brief amicus curiae of Criminal Justice Legal Foundation filed.
22	May 12 1995		Brief of respondents Patrick Keohane, et al. filed.
23	May 12 1995		Brief amici curiae of Florida, et al. filed.
24	Jun 13 1995		Reply brief of petitioner filed.
25	Jul 28 1995		CIRCULATED.
26	Aug 2 1995		SET FOR ARGUMENT WEDNESDAY, OCTOBER 11, 1995.(2ND CASE).
27	Oct 11 1995		ARGUED.

(2)

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

94-6615

CARL THOMPSON,

Petitioner,

Vs.

PATRICK KEOHANE, Warden,
BRUCE M. BOTELHO, Attorney General,
State of Alaska,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CARL THOMPSON
Petitioner
In Pro Per
Reg. No. 90712-011 (C-Unit)
3901 Klein Blvd.
Lompoc, Ca. 93436

QUESTION PRESENTED

What standard of review shall an appellant court employ when there's conflicting case law on the standard of review of when a suspect has been taken "into custody", triggering the requirement that Miranda warnings be administered?

The Second, Third, Sixth, and Eleventh Circuits consider the question to be essentially legal, or a mixed determination of law and fact, meriting de novo review. The Seventh, Eighth, and Ninth Circuits favor treatment as a factual matter, to be left undisturbed on appeal unless clearly erroneous.

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DECISION BELOW

Mr. Thompson brings this Petition from a final decision from the Ninth Circuit Court of Appeals, filed on August 11, 1994.

JURISDICTION IN THE SUPREME COURT

Carl Thompson was convicted by a jury verdict of the offenses of murder in the first-degree and tampering with physical evidence in the Superior Court for the State of Alaska at Fairbanks. Judgement was entered on July 22, 1987. Petitioner appealed the ruling on a suppression motion to the Alaska Court of Appeals; his conviction was affirmed. He then sought discretionary review in the Alaska Supreme Court; this petition was denied without opinion.

Petitioner then brought a petition under 28 U.S.C. §2254 in the United States District for the District of Alaska, in which he sought federal relief for a violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution. The petition was denied December 9, 1993, and a Certificate of Probable Cause was executed by the clerk, at the court's direction, on December 27, 1993.

The Court of Appeals for the Ninth Circuit issued it's opinion August 11, 1994. This Petition follows. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS

Amendment V to the United States Constitution: No person shall be... compelled in a criminal case to be a witness against himself...

Amendment XIV to the United States Constitution: No State shall... deprive any person of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

On September 10, 1986, two moose hunters found the body of a dead woman floating in a gravel-pit off Elliott Highway, twenty miles north of Fairbanks, Alaska.

On September 11, 1986, the Alaska State Troopers issued a press-release asking for the public's help in identifying the woman's body.

On September 12, 1986, the woman's body was identified through dental records as that of Dixie Gutman.

On September 13, 1986, David Huffaker and Mike Stanton made a joint tape-recorded statement at Trooper Headquarters implicating Mr. Thompson in the death of his ex-wife, Ms. Gutman.

Also on September 13, 1986, a woman named Valerie Key, notified troopers that she found some of the victim's personal belongings in a dumpster.

At this point, the Troopers had zeroed in on Mr. Thompson as their prime suspect in the murder of Ms. Gutman.

On September 15, 1986, Sergeant Stockard of the Alaska State Troopers telephoned Mr. Thompson and asked him to come down to the station and identify some personal effects of his ex-wife that had been found.

When Mr. Thompson arrived at trooper headquarters, he was taken to the interrogation room where Troopers' Hard and Stockard were waiting to interrogate him.

Early in the interrogation on 9/15/86, the troopers made it clear to Mr. Thompson that he was their prime suspect in the murder of his ex-wife.

The troopers next informed Mr. Thompson that other troopers were at his residence with a search warrant at that very moment, and they also had a search warrant for Mr. Thompson's truck, which he had driven to the station-house.

The troopers next confronted Mr. Thompson with the know facts and presented him with some of the evidence they had to prove he had not been truthful with them.

The troopers compared Thompson's situation to that of a poker player facing unbeatable odds. To further induce Mr. Thompson into incriminating himself; the troopers made promises of leniency if he cooperated and made a statement confessing to the murder of his ex-wife.

This interrogation lasted from 10:58 a.m. until 12:45 p.m., where for the first hour and a half, Mr. Thompson steadfastly denied any involvement in the death of his ex-wife, but in the end, under unrelenting pressure by the troopers, Mr. Thompson made a confession, without waiving or receiving a Miranda

warning.

After Mr. Thompson gave the troopers his statement, his truck was impounded and he was driven to a friends home by Trooper Hard, where he was arrested two hours later by the same troopers who just a short time earlier had told Thompson that he would not be arrested.

The trial court judge in his memorandum opinion characterized the troopers actions as a "devious tactic" and found that the troopers had intentionally circumvented the Miranda requirement to increase their chances of obtaining a confession from Mr. Thompson. The Alaska Court of Appeals characterized the decision of the trial court as "correct" and affirmed Mr. Thompson's conviction. (Published opinion at 768 P. 2d 127, Alaska App. 1989).

The Alaska Supreme Court denied review without opinion.

In the United States District Court, Judge Sedwick found that "State court findings of fact are presumed correct in Habeas Corpus proceedings" and denied the petition.

The Ninth Circuit Court of Appeals declined Mr. Thompson's invitation to find that the analysis of custody, for Miranda purposes, is a mixed question of law and fact. Relying upon Kranz v. Briggs, 983 F. 2d 961, 963-64 (9th Cir. 1993), as well as U.S.C. §2254 (d). Although, it should be noted that Mr. Thompson proceeded pro se in the Ninth Circuit Court of Appeals and in his opening brief he listed the standard of review as that prescribed by 28 U.S.C. §2254 (d), however Mr. Thompson's counsel at oral argument made it clear to the three judge panel that the

proper standard was de novo review in regards to a Miranda issue. The Court concluded that whether a Defendant is in custody for purposes of Miranda is a factual determination entitled to the presumption of correctness under 28 U.S.C. §2254 (d).

REASONS FOR GRANTING THE WRIT

This Court has not ruled upon the question presented. The decision of the Ninth Circuit, on the standard of review, conforms to the approaches of the Seventh and Eighth Circuits, but conflicts with the treatment accorded the question by the Second, Third, Sixth, and Eleventh Circuits. The Second and Seventh Circuits have particularly commented upon the "split" in the Circuits and the lack of guidance form this Court.

ARGUMENT

In 1987, the Second Circuit expressed doubt about the standard of review to be employed in considering a trial court's decision that an individual was not, in custody when he was questioned by the police. It capsulized the Supreme Court's treatment of "custody" for the Fourth Amendment purposes, without identifying a rule of law applicable in the Fifth Amendment area.

The Supreme Court has not been precise in stating whether a trial court's conclusion as to the Fourth Amendment custody is a question of fact or a conclusion of law. In Florida v. Royer,

460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2nd 229 (1983), a case involving a search and arrest of a person fitting the "drug courier profile", see Id., at 493 n. 2, 103 S. Ct. at 1322 n. 2, a plurality of the Court appears to reach an independent conclusion that the defendant was seized within the meaning of the Fourth Amendment:

> Asking for and examining Royer's ticket and his drivers's license were no doubt permissable in themselves, but when officers identified themselves as narcotics agents, told Royer he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that he was free to depart, Royer was effectively seized for purposes of the Fourth Amendment. Id., at 501, 103 S. Ct. at 1326 (plurality opinion of White, J.).

Earlier in his opinion however, Justice White states that the issue is whether the record supports the conclusion reached by the state intermediate appellate court whose judgement was being reviewed. Id. The state appellate court had disagreed with the trial court. A plurality of the Supreme Court was more explicit in United States v. Mendenhall, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980), the first major drug courier profile case, rebuking the Court of Appeals for substituting it's view of the evidence for that of the District Court. Id., at 557, 100 S. Ct. at 1878 (plurality opinion of Stewart, J.) (citing Jackson v. United States, 353 F. 2d 862 (D.C. Cir. 1965), (applying a "clearly erroneous" test). But cf. Davis v. North Carolina, 384 16 L. Ed 2d 895 (1966), (stating that appellate courts are to make an "independent determination of the ultimate

issue of voluntariness" of a confession).

United States v. Ceballos, 812 F. 2d 42, 47 n. 1 (2d Cir., 1987).

The Seventh Circuit was no better positioned three years latter to ascertain the Supreme Court's direction on the question of custody:

> As an initial matter, there is a question as to the proper standard of appellate review of whether a person was "in custody" for purposes of Miranda. Linnick, claims that the proper standard is de novo review of the district court's holding. For support, he points to United States v. Hocking, 860 F. 2d 769, 772 (7th Cir. 1988), where the court held that the "ultimate issue of whether there was a custodial interrogation is a mixed question of law and fact". As such, Hocking held that the district court's "determination is independently reviewable by an appellate court". Id. There was no direct authority for this holding, however, and the court in Hocking noted conflicting authority supporting the more deferential "clearly erroneous" standard. See Id.

Due to lack of definitive Supreme Court precedent on the issue, see United States v. Boden, 854 F. 2d 983, 990 (7th Cir., 1988), the announced standards range from Hocking's de novo review, 860 F. 2d at 772, to an intermediate standard of granting the district court's determination "some difference", United States v. Ceballos, 812 F. 2d 42, 47 & n.1 (2d Cir. 1987), to the clearly erroneous standard that grants district court determinations the greatest deference. United States v. Teslim, 869 F. 2d 316, 321 (7th Cir. 1989); cf. United States v. Malin, 980 F. 2d 168, 169-70 (7th Cir. 1990) (noting a split in authority on the question whether probable cause determinations

are entitled to de novo or clearly erroneous review). The government does not address the question and fails to suggest an appropriate appellate standard in this case.

United States v. Lennick, 917 F. 2d 974, 976-77 (7th Cir. 1990). The Seventh Circuit did not resolve the question in Lennick. It's 1988 decision in Hocking, citing in Lennick, includes an express election of the view that "custody" is a mixed question of law and fact, requiring "independent review" in the appellate court. United States v Hocking, 860 F. 2d 772. In a recent turnabout, the "precedential value" of Hocking was "vitiated" in favor of deference to the findings of the District Court, because, a 1992 panel found, Hocking had been decided in a manner out of line with the thinking of the other circuits. United States v. Levy, 955 F. 2d 1098, 1103 & n. 5 (7th Cir. 1992). Levy, however, may not represent a final solution even in the Seventh Circuit; the court expressly endorsed deference only to the "underlying factual findings and ... resolution of credibility disputes" of the district court. It did not decide whether the conclusion of legal significance, whether those facts supported a finding of custody, was one to be decided under the "clearly erroneous" standard as well.

The Eighth Circuit has made a more clearly identifiable choice: the finding that an individual questioned by the police is in "custody" is reviewed under a "clearly erroneous standard". United States v. Sutera, 933 F. 2d 641, 646 (8th Cir. 1991); United States v. Griffin, 922 F. 2d 1343, 1347 (8th Cir. 1990).

In contrast, the Second Circuit accords "some deference" to

the conclusions of the trial court because the findings in a particular case may be intertwined with creditability determinations, but the resolution of whether a reasonable person would have believed himself to have been in custody is regarded as a legal question independently evaluated on the appeal. United States v. Ceballos, 812 F. 2d at 46-47.

The Third, Sixth, and Eleventh Circuits fall in line with the Second. Without qualification, these three courts consider the question of law and fact warranting de novo review. See for example, Jacobs v. Singletray, 952 F. 2d 1282, 1291 (11th Cir. 1992); Williams v. Withrow, 944 F. 2d 284, 288 (6th Cir. 1991); United States v. Torkington, 874 F. 2d 1441, 1445 (11th Cir. 1989); United States v. Calisto, 838 F. 2d 711, 717 (3rd Cir. 1988); Cobb v. Perini, 832 F. 2d 342, 346 (6th Cir. 1987); United States v. Mesa, 638 F. 2d 582, 591 (3rd Cir. 1980).

The argument favoring an independent review is expressed in the concurrence in United States v. Mesa:

> "Custodial interrogation" is a legal term of art central to Miranda jurisprudence, and a decision whether or not "custodial interrogation" occurred is a matter of law to be determined in accordance with the policies underlying the Miranda rule. The legal nature of the determination is evidenced by the numerous Supreme Court decisions deciding whether certain facts constitute "custody" or "interrogation". See, e.g. Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980); Oregon v. Mathiason, 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977); Orozco v. Texas, 394 U.S. 324, 89 S. Ct. 1095, 22 L. Ed. 2d 311 (1969).
>
> Accordingly, an appellate court is free to re-examine the trial court's legal conclusion as to the applicability of the Miranda rule.

> The standard of appellate review does not change simply because the legal determination in a Miranda situation depends on the particular facts of each case. United States v. Mesa, 638 F. 2d at 591 n. 3.

Perhaps this courts holding in Miller v. Fenton, 474 U.S. 104, 88 L. Ed. 2d 405, 106 S. Ct. 445, will assist the Court, as it resolved the issue of whether voluntariness of a confession was a issue of fact or a legal question meriting de novo review in the appellate court's.

State court judge's are not in an appreciably better position than the federal habeas corpus court to make determinations in confession cases because "the taking of a confession almost invariably occur, not in open court, but in a secret and more coercive environment". "The practical considerations that have led this Court to find other issues within the scope of the §2254 (d) presumption are absent in the confession text". Id., at 407.

Unlike such issues as the impartiality of a juror or competency to stand trial, assessments of creditability and demeanor are not crucial to the proper resolution of the ultimate issue of facts in a confession secured in violation of Miranda; the trial court in Mr. Thompson's case relied on the two hour confession transcript to reach it's determination, so why would a federal habeas court be in a subordinate position to assess the same record? This issue is no different than a voluntariness issue where this Court found was beyond the reach of §2254 (d); Miller v. Fenton, Id. at 414, (1985).

CONCLUSION

The circuits are irretrievably split on a question of grave concern to those charged with criminal offenses in the state and federal courts: Shall federal courts independently review, based upon uniform federal standards, the occasions which require the administration of Miranda warnings? The Circuit Courts are now moved to acknowledge the divergence in the decisions of the courts on this question and to bemoan a lack of direction from this Court. The issue invites the intervention of the Supreme Court on certiorari.

Respectfully Submitted,

CARL THOMPSON

Dated: October 6, 1994

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

CARL THOMPSON, Petitioner, v. JOSEPH CLASS, et al., Defendants.	CASE NO. A91-171 CIVIL INITIAL REPORT AND RECOMMENDATION RE: PETITION FOR HABEAS CORPUS

Carl Thompson, presently serving a life sentence for first degree murder following a conviction in an Alaska state court, has filed a habeas corpus petition under 28 U.S.C. §2254 in which he claims his Constitutional rights to due process and against self-incrimination were violated when his involuntary confession was admitted at trial during the prosecution's case-in-chief. This Court, having reviewed the petition, the memorandum in support thereof, and exhibits attached thereto, including a transcript of petitioner's statements to the police, the state's response

thereto and petitioner's reply, and having heard argument thereon, now makes its Report and Recommendation.

FINDINGS OF FACT

1. In 1987, in the Alaska Superior Court in Fairbanks, Alaska, petitioner was convicted by a jury on one count of first-degree murder and one count of tampering with physical evidence. He was subsequently sentenced to ninety-nine years on the first-degree murder conviction and an additional five years on the tampering charge to be served consecutively. The Alaska Court of Appeals affirmed the convictions, found the consecutive five year sentence for tampering to be excessive and remanded for resentencing. On remand, the trial court resentenced petitioner to a term of 99 years.

2. Petitioner moved to suppress the tape recorded confession he made to two Alaska State Troopers before trial on the grounds that the interrogation violated his fifth amendment Miranda rights; and that his resulting confession was involuntary. The motion was denied. At trial, during the prosecution's case-in-chief, a portion of the tape

recorded confession in which he admitted stabbing his ex-wife was played to the jury.

3. Petitioner has exhausted his available state court remedies.

4. On September 10, 1986, the body of a woman was found floating in a lake off the Elliott Highway by two moose hunters. The woman had been severely beaten and stabbed a total of twenty-nine times. She was clad only in a T shirt and wrapped in chains, a bedspread and a tent fly. There was a heart-shaped tatoo with the name "Carl" over her left chest. After the Alaska State Troopers advertised for information concerning the identity of the body, Carl Thompson telephoned the troopers and reported that the description fit his former wife who had been missing since that August. A subsequent dental examination conclusively identified the body as Thompson's former wife, Dixie.

5. On September 15, 1986, after questioning Thompson's brother-in-law and another witness, the Alaska State Troopers' investigation focused on Thompson as the most likely person to have killed Dixie Thompson.

6. Intending to question Thompson about the murder, Trooper Stockard contacted him and asked him to come in to

the trooper headquarters on the pretext of identifying a coat, some jewelry boxes and jewelry that might have belonged to his former wife. Once Thompson arrived at the office, Stockard and another trooper interrogated Thompson for approximately one hour and 16 minutes. During the questioning, Stockard repeatedly informed Thompson that he was not under arrest, that he was free to leave at any time, and that he would he would be able to leave when the questioning ended.

7. During the interrogation, the troopers told Thompson that they believed he had killed his former wife and urged him to help them get at the truth. Stockard told Thompson to tell his side of the story so that they could present that version to the District Attorney. Otherwise, he warned Thompson that the prosecutor might conclude that killing of Dixie Thompson was first-degree murder. Stockard suggested that if Thompson explained his part in the slaying, it was possible that he might only be guilty of a lesser charge such as manslaughter or negligent homicide; and would be facing a minimal sentence such as two to five years, as opposed to a ninety-nine year sentence for first-degree murder.

8. After several lengthy statements by the troopers in which they informed Thompson that they didn't think the killing was first-degree murder, and guaranteed him that they weren't going to arrest him in the office and that he would be permitted to leave, Thompson abandoned his original story and admitted killing his ex-wife. In so doing, he asserted that he initially stabbed her in self defense and then lost control and continued to stab her in the heat of passion.

9. Once the interrogation was concluded, Thompson was permitted to leave the trooper headquarters, as promised. He was arrested approximately two hours later and charged with first degree murder.

10. At no time during the interrogation did the troopers advise Johnson of his Miranda rights.

DISCUSSION

This petition raises two questions. First, was Thompson's confession obtained in violation of his 5th Amendment right against self-incrimination? Second, were his statements involuntary? For the reasons given herein,

the answer to both questions should be in the negative.

Thompson was neither in custody nor deprived of his rights in any significant way during the interrogation. He was repeatedly told that he was not under arrest and that he could leave anytime. Trooper Stockard even guaranteed that he would be free to leave at the end of the questioning. In fact, when the questioning was finished and he had admitted killing his wife, he was allowed to go.

The trial judge found that Thompson was not in custody for Miranda purposes. The Alaska Court of Appeals affirmed his decision. (Thompson v. State, 768 P.2d at 130-31). This finding is presumptively correct. See 28 U.S.C. § 2254(d)

The United States Supreme Court has held that a person who is a suspect is not in custody for Miranda purposes unless there has been some actual indication of custody that would make a reasonable, innocent person feel that he was not free to break off the questioning and leave. See Minnesota v. Murphy, 465 U.S. 420, 431, 104 S.C. 1136, 1144, 79 L.Ed.2d 409 (1984); California v. Beheler, 463 U.1S. 1121, 1124, 103 S.Ct. 3517, 3519-20, 77 L.1Ed.2d 1275 (1983). The Supreme Court has adopted an objective,

"reasonable man" test for deciding whether a person is in custody or otherwise subject to restraints comparable to those associated with formal arrest. See Berkemer v. McCarty, 468 U.S. 420, 441, 442, 104 S.Ct. 3138, 3150, 3151, 82 L.Ed.2d 317 (1984).

In determining whether someone is in custody, the trial court must consider the totality of the circumstances and then decide whether a reasonable person would have believed that he or she was not free to leave. United States v. Pinion, 800 F.2d 976, 978-79 (9th Cir. 1986), cert. denied, 480 U.S. 936, 107 S.t. 1580, 94 L.Ed.2d 770 (1987). Relevant factors to be considered are: (1) the language used by the officer to summon the individual; (2) the extent to which the individual is confronted with evidence of his guilt; (3) the physical surroundings of the interview; (4) its duration; and, (5) the degree of pressure applied to detain the individual. United States v. Wauneka, 770 F.2d 1434, 1438 (9th Cir. 1985).

Here, there is no indication language was used by trooper Stockard that would imply to Thompson that he should expect to be arrested when he came into the office. During the interrogation, he was confronted with some evidence

implying his involvement in his ex-wife's killing (e.g. tire tracks at the scene where the body was found similar if not identical to the tire patterns on his vehicle), although this information did not appear to be sufficient by itself to encourage him to change his story.

The interview took place On September 15, 1986 in the troopers' offices. It began at 10:58 a.m. and ended at 12:14 p.m.. Thompson was not physically restrained in any way. Both troopers were dressed in plain clothes. There is no indication that he would have been prevented from leaving if he chose to do so. His vehicle keys were not taken from him until after he confessed, and he was told that his truck was going to be impounded. He was repeatedly told that he was free to leave. He was permitted to leave following the interrogation. The location, by itself, does not indicate Thompson was in custody and required Miranda warnings. Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977). Neither does the hour and sixteen minutes involved in the questioning.

Thompson spoke freely with the troopers concerning his relationship with his former wife. He initially offered them a scenario in which he appeared to be innocent of his

ex-wife's death. The troopers had focused on him as the principal suspect in her killing, although this, by itself, is insufficient to require Miranda warnings. Minnesota v. Murphy, 465 U.S. 420, 431, 104 S.Ct. 1136, 1144, 79 L.Ed.2d 409 (1984). They obviously wanted him to implicate himself; and, employed classic interrogation techniques in their successful attempt to secure a confession. Nevertheless, they consistently reminded Thompson that he was free to leave at any time he wanted.

Both the trial judge and the state appellate court carefully considered the totality of circumstances surrounding this issue. They applied an objective, reasonable person test, finding that Thompson was not in custody at the time of his interrogation and, therefore, the troopers were not required to give him his Miranda warnings. The record amply supports this finding.

Thompson alleges that his confession was coerced by the troopers' promise to bring his version of the facts to the attention of the district attorney, and their statements implying to him that they believed he might be charged with negligent homicide or manslaughter, rather than first degree murder, if they did. This argument fails because the troopers never directly or indirectly promised that they would do more than bring his story to the prosecutor and

search for any facts that would corroborate it. They did not have the charging authority, and they never implied otherwise. Their statements, by themselves, are not sufficient to render Thompson's statements involuntary: "The promise must be sufficiently compelling to overbear the suspect's will in light of all attendant circumstances." United States v. Leon Guerrero, 847 F.2d 1363 at 1366 (9th Cir. 1988). The Alaska Court of Appeals, after a careful review of all of the circumstances surrounding the confession, found that the troopers' statements were not the kind of inducements that were likely to overcome his will and bring about a confession that was not voluntary. Thompson v. State, 768 P.2d at 131-32. The record supports this finding.

RECOMMENDATION

Based upon the foregoing, it is hereby recommended that this petition be DENIED.

DATED this 29th of December, 1992.

Harry Branson
U.S. Magistrate Judge

CC:
JUDGE SEDWICK
J. A. Scukanec (AAG-318)
M. Friedman

Andres v. McCall 628 F.2d 1185

Pursuant to Local Magistrate Rule 12(C), a party seeking to object to this proposed finding or recommendation shall file written objections with the Clerk of U.S. District Court no later than THURSDAY, JANUARY 21, 1993. The failure to object to a magistrate judge's findings of fact may be treated as a procedural default and waive the right to contest those findings on appeal. McCall v. Andres, 628 F.2d 1185, 1187-89 (9th Cir.) cert denied 450 U.S. 996 (1981). Response(s) to the objections shall be filed on or before WEDNESDAY, FEBRUARY 3, 1993. No reply to a response will be received. The parties shall otherwise comply with provisions of Local Magistrate Rule 12(C).

Reports and recommendations are not appealable orders. Any notice of appeal pursuant to Fed.R.App.P. 4(a)(1) should not be filed until entry of the district court's judgment. See Hilliard v. Kencheloe, 796 F.2d 308 (9th Cir. 1986).

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

CARL THOMPSON,

Petitioner,

v.

JOSEPH CLASS, et al.,

Defendants.

Case No. A91-171-CIV (JWS)

ORDER FROM CHAMBERS

BACKGROUND

On December 29, 1992, Magistrate Judge Branson recommended that Carl Thompson's petition for a writ of habeas corpus be denied. Thereafter, following an independent review, this court concluded that the recommendation was correct and denied the petition on February 18, 1993. Petitioner then filed a motion to vacate judgment and to allow a new ten-day period in order to file objections to Magistrate Judge Branson's report and recommendation. This court granted the motion on July 19, 1993. Petitioner then filed timely objections. Following a review of the those objections, Magistrate

Judge Branson certified his initial report and recommendation as final.[1] The matter is now referred back to this court for consideration.

Petitioner Carl Thompson was convicted of first degree murder and tampering with physical evidence. He raises two issues in his petition: that certain incriminating statements were obtained in violation of his Miranda rights; and that the statements were involuntary. Petitioner argues that he was actually in custody when he made the statements. Petitioner has exhausted his state remedies as to these issues.

In his initial and final report and recommendation, Magistrate Judge Branson has made findings of facts, conclusions of law, and recommends that the petition be denied. After a thorough and independent review of the record, with two exceptions to the findings of fact, the court agrees with the Magistrate Judge's recommendation. See United States v. Remsing, 874 F.2d 614, 618 (9th Cir. 1989).

DISCUSSION

I. Was Mr. Thompson In Custody For Miranda Purposes?

Petitioner objects to the Magistrate Judge's finding of fact that Mr. Thompson's questioning lasted approximately one hour and sixteen minutes. The transcript of Mr. Thompson's questioning reveals that it lasted from 10:58 a.m. until 12:54 p.m. See Docket no. 1, Exhibit F. Therefore, as petitioner contends, the questioning lasted for at least one hour and fifty-six minutes.

[1]Magistrate Judge Branson's only revision involved a typing error. In the initial report and recommendation, petitioner Thompson was referred to in one instance as "Johnson."

Petitioner also objects to the Magistrate Judge's implicit finding of fact that Mr. Thompson's keys were only taken from him after he made his confession. In the evidence before the court, it cannot be conclusively determined when, precisely, Mr. Thompson's keys were taken from him. Nevertheless, the evidence shows that Mr. Thompson was repeatedly informed that he was free to leave at any time. See Docket no. 1, Exhibit F, at 27, 49-50, 81, 84-86. Moreover, the Alaska Court of Appeals also found that, at numerous times, Mr. Thompson told he was free to leave. See Docket no. 1, Exhibit A, at 8.

The fact that the questioning lasted almost two hours, rather than one and one-quarter hour, however, is insufficient, on its own, to reverse the state courts' determination that Mr. Thompson was not in custody for Miranda purposes. Federal courts considering habeas corpus petitions give deference to the state court;s factual findings. 28 U.S.C. § 2254(d). The state court's factual determination that Thompson was not in custody is, thus, presumptively correct. See Marshall v. Lonberger, 459 U.S. 422, 431-32 (1983); see also Dres v. Campoy, 784 F.2d 996, 998 (9th cir. 1986) (state court findings of fact are presumed correct in habeas corpus proceedings). Accordingly, this court agrees with the Magistrate Judge's recommendation that Mr. Thompson's petition should be denied.

IT IS THEREFORE ORDERED THAT:

For the reasons stated above, this petition

DATED the 7th day of December, 1993, at

cc: M. Friedman
J. Scukanec (AAG 318)
Magistrate Judge Bra

AO 450 (Rev. 5/85) Judgment in a Civil Case

FILED
DEC 09 1993
UNITED States DISTRICT COURT
DISTRICT OF ALASKA
By Deputy

United States District Court

DISTRICT OF ALASKA

CARL THOMPSON

V.

JOSEPH CLASS, et al

JUDGMENT IN A CIVIL CASE

CASE NUMBER: A91-171CIV (JWS)

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT the petitioner's, Carl Thompson, petition for Writ of Habeas Corpus is DENIED.

APPROVED:

U.S. District Court Judge

8 December '93
Date

12/9/93
Clerk

(By) Deputy Clerk

cc: O&J 5146
AAG 318
M. Friedman

12/10/1993 10:13 FROM K&C CONST. INC. TO P.02

AO 450 (Rev. 5/85) Judgment in a Civil Case

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U.S. District Court Judge

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Date

12/9/93
Clerk

(By) Deputy Clerk

cc: O&J 5146
AAG 318

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARL THOMPSON, Petitioner-Appellant, v. PATRICK KEOHANE, Warden; CHARLES E. COLE, Attorney General, State of Alaska, Respondent-Appellee.	CA. No. 94-35052 DC. No. CV-91-00171-JWS M E M O R A N D U M*

Appeal from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Argued and Submitted August 5, 1994
Anchorage, Alaska

BEFORE: PREGERSON, CANBY and BOOCHEVER, Circuit Judges

Carl Thompson appeals the district court's denial of his petition for writ of habeas corpus. Thompson alleges that his incarceration violates the Constitution because the state trial court admitted statements that Thompson argues were obtained in violation of his Miranda rights and a confession that he argues was involuntary. We affirm.

I.

We recently have held that a state court's determination that a defendant was not in custody for purposes of Miranda is a question of fact entitled to the presumption of correctness under 28 U.S.C. § 2254(d). Krantz v. Briggs, 983 F.2d 961, 963-64 (9th Cir. 1993). Thompson has not shown, and it does not otherwise appear, that any of the exceptions to the presumption, see 28 U.S.C. § 2254(d)(1)-(8) (1988), apply in this case. Accordingly, we may only disturb the state court's factual determination if it lacks even fair support in the record. Krantz at 964.[1]

We have reviewed the entire transcript of Thompson's interrogation. Thompson voluntarily appeared at the trooper headquarters. During the interrogation, the troopers assured him several times that he was free to terminate the interview and leave. Indeed, even after he confessed, Thompson was permitted to leave when the interview was complete. "Fair support" exists for the state court's determination that Thompson was not in custody for Miranda purposes. See id. at 963 (test for determining custody is whether, based upon a review of all the pertinent facts, a reasonable innocent person in such circumstances would conclude that they were not free to leave).

II.

We review de novo the question whether, considering the totality of the circumstances, Thompson's will was overborne through psychological pressure rendering his confession involuntary. See Miller v. Fenton, 474 U.S. 104, 110 (1985). We

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

[1] This standard requires that we "more than simply disagree with the state court." Krantz, 983 F.2d at 964. Accordingly, Thompson's attempts to analogize the circumstances of his interrogation to the circumstances of cases in which this court has held that a federal defendant was in custody for purposes of Miranda are unavailing.

have independently evaluated the transcript of Thompson's interrogation and conclude that, the cumulative effect of those tactics did not overbear Thompson's will.

AFFIRMED.

No. 94-6615

In The

Supreme Court of the United States

October Term, 1994

CARL THOMPSON,
Petitioner,

v.

PATRICK KEOHANE, Warden,
BRUCE M. BOTELHO, Attorney General,
State of Alaska,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

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Counsel for Respondent

QUESTION PRESENTED FOR REVIEW

In a habeas corpus action brought by a state prisoner, did the Ninth Circuit Court of Appeals err in applying the presumption of correctness to the state court's factual finding that Thompson was not in custody when he was interviewed by the police?

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Statutes

28 U.S.C § 2254(d) provides:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:
>
> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent , or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

Alaska Statute 11.41.100(a)(1)(A) provides:

> MURDER IN THE FIRST DEGREE. (a) A person commits the crime of murder in the first degree if
>
> (1) with intent to cause the death of another person, the person
>
> (A) causes the death of any person[.]

Alaska Statute 11.56.610(a)(1) provides:

> TAMPERING WITH PHYSICAL EVIDENCE. (a) A person commits the crime of tampering with physical evidence if the person
>
> (1) destroys, mutilates, alters, suppresses, conceals, or removes physical evidence with intent to impair its verity or availability in an official proceeding or a criminal investigation[.]

STATEMENT OF THE CASE

A. Introduction

Carl Thompson was convicted of first-degree murder and tampering with physical evidence in the superior court of the State of Alaska. After the Alaska appellate courts affirmed his convictions, Thompson petitioned for a writ of habeas corpus in the federal district court, claiming that his pre-arrest statement to the police was taken in violation of Miranda v. Arizona and should have been suppressed. The Ninth Circuit Court of Appeals applied the presumption of correctness to the Alaska court's factual finding that Thompson was not in custody during the first police interview. Because the state court's finding that Thompson was not in custody was not clearly erroneous, the Ninth Circuit concluded that Thompson's Miranda rights were not violated during the interview.

Thompson seeks review of the Ninth Circuit's ruling on the admissibility of his statement. More specifically, he seeks review of the conclusion that the determination whether a person is in custody for Miranda purposes is a factual determination subject to the presumption of correctness in 28 U.S.C. § 2254(d).

B. Factual Background

On September 10, 1986, two moose hunters found the body of a dead woman floating in gravel pit lake off the Elliott Highway near Fairbanks, Alaska. The body was clothed only in a T-shirt and had a heart-shaped tatoo with the name "Carl" over the left breast;

an autopsy revealed that the woman had been severely beaten and stabbed twenty-nine times. The body had been wrapped in a bedspread and a tent fly and weighted down with chains before being thrown into the water.

On September 11, the Alaska State Troopers issued a press release asking the public for assistance in identifying the dead woman and directing the public's attention to the unique tatoo on the body. Later that same day, Carl Thompson telephoned the troopers and reported that his former wife, Dixie Thompson, fit the description of the body. Thompson told the troopers that he had taken his former wife to the airport in early August and that he had not seen her again since that time. Thompson expressed concern for his former wife's well-being and asked the troopers to call him back as soon as more information became available.

Thompson called the troopers again on September 12, inquiring about any developments in the investigation. Thompson was told in this conversation that the body found in the lake had been positively identified as that of his former wife. Thompson talked freely about his relationship with his former wife and expressed his desire to cooperate in the investigation. Thompson also stated that he was familiar with the area around the gravel pit where the body was found, and that he and his former wife had gone there a few times in the past.

On September 15, 1986, at approximately, 10:15 a.m., Investigator Stockard telephoned Thompson and asked him to come to the state troopers' office to identify various items of personal

property belonging Dixie Thompson. These items and the apparent murder weapon had been turned over to the troopers by a woman who had found them in a dumpster. By this time, the troopers had focused the investigation on Thompson as the most likely person to have killed Dixie Thompson. It was undisputed that Investigator Stockard's primary reason for contacting Thompson was to question him about the murder, but Stockard did not tell this to Thompson.

Thompson drove himself to the troopers' office, arriving there at approximately 11:00 a.m. Thompson was questioned by Investigator Stockard and another trooper for approximately two hours. Investigator Stockard did not advise Thompson of his Miranda rights before or during the interview because he did not intend to arrest Thompson at that time and did not consider him to be in custody. During the interview, both troopers wore civilian clothes and had no visible weapons. Thompson was seated next to the door of the interview room with no one blocking his exit, and he was not restrained in any manner. During the questioning, Investigator Stockard repeatedly assured Thompson that he was not under arrest and that he was free to leave at any time.

Thompson initially told the troopers that he knew nothing about his former wife's death. Indeed, the first eighty-three pages of Thompson's statement (approximately the first one hour and fifteen minutes of the interview) consisted mainly of Thompson repeating his story about taking Dixie to the airport and denying any knowledge of the events surrounding her death.

When confronted directly with the evidence known to the troopers, Thompson abandoned his initial story and admitted killing his former wife, but claimed that he had acted in self-defense. Thompson told the troopers that he and Dixie had argued and gone to bed after returning home from a friend's house. Upon awakening the next morning, the argument continued and intensified. According to Thompson, Dixie reached for a gun that was on a file cabinet in the kitchen. Thompson stated that he thought Dixie was going to shoot him, so he grabbed a knife and stabbed her. Thompson stated that Dixie fell down and that he stabbed her again because she kept screaming and he didn't want to see her suffer.

At the conclusion of the interview, Thompson was told that he was free to go, but that his truck would have to be impounded in connection with investigation. Thompson was given the options of calling a cab, having a friend pick him up, or receiving a ride from the troopers; Thompson accepted the offer of a ride and one of the troopers drove him home. Thompson was arrested approximately two hours later and charged with first-degree murder.

While Investigator Stockard was questioning Thompson at trooper headquarters, other troopers were executing a search warrant at Thompson's residence. Thompson was informed during the interview that his residence was being searched pursuant to the search warrant. Scientific testing conducted during the search of the residence revealed a large concentration of blood in the kitchen area where Thompson stated the stabbing occurred; the tires of Thompson's truck were of similar size and tread design to the

tire impressions found near the gravel pit where Dixie Thompson's body had been discovered.

C. State Court Proceedings

Thompson was indicted for murder in the first degree, AS 11.41.100(a)(1)(A), and tampering with physical evidence, AS 11.56.610(a)(1). Prior to trial, Thompson moved to suppress his September 15 statement on two grounds. First, he alleged that he was in custody for Miranda purposes during the interview at trooper headquarters and that Investigator Stockard failed to inform him of his Miranda rights. Second, Thompson alleged that his statement was not voluntary because it was the result of psychological coercion and promises of leniency. After an evidentiary hearing, the trial judge ruled that Investigator Stockard was not required to administer Miranda warnings prior to the September 15 interview because Thompson was not in custody. The trial judge also found that Thompson's statement was voluntary. Based on these findings, the trial court denied Thompson's motion to suppress.

The case was tried to a jury. During the trial, the state played the portion of Thompson's statement in which he admitted killing his former wife. The jury found Thompson guilty of both charged offenses, murder in the first degree and tampering with physical evidence.

Thompson appealed his conviction to the Alaska court of appeals. That court affirmed the trial court's factual finding that Thompson was not in custody during the interview at trooper headquarters:

> In arguing that [the trial judge] erred in finding that the police were not required to give Thompson Miranda warnings, Thompson does not really argue that he was in custody when the interview occurred. He concedes that "[he] may or may not have been in a custodial setting at the time he was interrogated." Instead, Thompson argues that the police intentionally interrogated him in such a way as to circumvent the requirements of Miranda. He contends that the police went out of their way to set up circumstances where Trooper Stockard's questioning of Thompson would not be custodial so that Trooper Stockard would not have to give Thompson Miranda warnings.
>
> In his written decision finding against Thompson on this issue, [the trial judge] appears to have found that the police intentionally arranged to interrogate Thompson in a non-custodial manner to increase the likelihood that they would get a statement from him. [The trial judge] described this as a "devious police tactic." However, [the trial judge] concluded that the proper test was whether a reasonable person would believe that he was free to leave. [The trial judge] concluded that Thompson, as a reasonable person, would have felt free to break off the interrogation and leave.
>
> It seems clear that [the trial judge] applied the correct test under Hunter v. State, 590 P.2d 888 (Alaska 1979) (adopting objective reasonable person test for determining whether a suspect was in custody for Miranda purposes)]. As we have pointed out earlier, Thompson does not really contend that he was in custody at the time he was questioned by Trooper Stockard. Thompson, responding to Trooper Stockard's request, went to the trooper headquarters on his own. Trooper Stockard assured Thompson numerous times that he was free to leave, that he was not under arrest, and that after the questioning finished, Thompson was free to go. And, in fact, Thompson was allowed to leave after the interrogation ended.

Thompson v. State, 768 P.2d 127, 130-31 (Alaska App. 1989). The

appellate court also affirmed the trial court's finding that Thompson's statement was voluntary. Id. at 131-32.

Thompson's request for discretionary review by the Alaska supreme court was denied.

D. Federal Court Proceedings

Thompson filed a petition for writ of habeas corpus in the federal district court, claiming, inter alia, that his Miranda rights had been violated. The district court denied the petition, concluding that the record fairly supported the state court's factual finding that Thompson was not in custody during the interview at trooper headquarters.

Thompson appealed to the Ninth Circuit. That court, relying on its decision in Krantz v. Briggs, 983 F.2d 961 (9th Cir. 1993), held that "a state court's determination that a defendant was not in custody for purposes of Miranda is a question of fact entitled to the presumption of correctness under 28 U.S.C. § 2254 (d)." [App. 1-2 (citations omitted)] The Ninth Circuit went on to conclude that the state court's determination that Thompson was not in custody for Miranda purposes had "fair support" in the record. [App. 2] The Ninth Circuit also concluded that Thompson's confession was voluntary. [App. 2-3]

Thompson now asks this Court to review the Ninth Circuit's holding that custody is a factual determination subject to the presumption of correctness accorded state court factual findings under 28 U.S.C. § 2254(d). He does not seek review of the holding that his confession was voluntary.

REASONS FOR DENYING THE WRIT

I. THE CONFLICT IN THE CIRCUITS REGARDING THE DEGREE OF DEFERENCE ACCORDED TRIAL COURT DETERMINATIONS OF CUSTODY NEED NOT BE RESOLVED AT THIS TIME

The Ninth Circuit Court of Appeals in Krantz v. Briggs, 983 F.2d 961, 963-64 (9th Cir. 1993), held that the determination of whether a person is in custody for Miranda purposes is a factual determination subject to the presumption of correctness accorded state court factual findings under 28 U.S.C. § 2254(d). This holding is consistent with the methodology applied by this Court in Miller v. Fenton, 474 U.S. 104 (1985), for determining whether an issue is one of fact or law in the habeas context.

In Miller, this Court discussed the difficulty in distinguishing questions of fact from questions of law. It noted that "an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." 474 U.S. at 113 (citation omitted). The Court explained that issues that involve the credibility of witnesses and an evaluation of their demeanor are treated as questions of fact and are subject to the presumption of correctness accorded by § 2254(d).

The Ninth Circuit cited Miller v. Fenton when it held that a state court's determination that a person was not in custody for Miranda purposes was a factual one. Krantz v. Briggs, 983 F.2d at 964. Application of the Miller v. Fenton methodology supports the Ninth Circuit's conclusion. This Court adopted an objective test for determining whether a person is in custody or otherwise deprived of his freedom of action in any significant way. See e.g.

Stansbury v. California, 511 U.S. ___, 114 S.Ct. 1526 (1994); Berkemer v. McCarty, 468 U.S. 420, 442 (1984). A state court trial judge examines the circumstances surrounding the interview and decides whether a reasonable person would have believed that he was free to leave. Resolution of the custody issue involves a determination of what actually occurred, when and where it occurred, what words were spoken and in what context, and what tone of voice was used. These determinations depend in large part on the credibility and demeanor of the witnesses who testify before the state trial court judge regarding the circumstances of the interview. As such, the trial judge's finding that a reasonable person would have believed he was free to leave involves a finding of fact.

Only two circuits other than the Ninth Circuit have examined the issue in the habeas context. The Sixth Circuit in Cobb v. Perini, 832 F.2d 342, 346 (6th Cir. 1987), cert. denied, 486 U.S. 1024 (1988) concluded:

> Whether a person is in custody is a question of law to be determined by the court before deciding whether to admit testimony before a defendant was given his Miranda warnings. See Fed.R.Evid. 104(a) ("Preliminary questions concerning ... the admissibility of evidence shall be determined by the court.)

The Sixth Circuit's conclusion was not based on a comparison of which determinations have been treated as factual and which determinations have been treated as mixed questions of fact and law. Rather, the court simply referred to a general evidence rule stating that preliminary questions regarding the admissibility

of evidence are determined by the court. This analysis is faulty because the court determines a myriad of questions which are factual in nature and which are subject to the presumption of correctness. Examples of factual determinations made by trial courts include: a defendant's competency to stand trial, Magio v. Fulford, 462 U.S. 111, 117-118 (1983) (per curiam); whether a defendant entering a guilty plea received adequate notice of and understood the charges, Marshall v. Lonberger, 459 U.S. 422, 431-437 (1983); the impartiality of a particular juror, Patton v. Yount, 467 U.S. 1025, 1038-1039 (1984); the decision to dismiss a potential juror for cause, Wainwright v. Witt, 469 U.S. 412, 429 (1985); and the effect of an ex parte communication on a juror's impartiality, Rushen v. Spain, 464 U.S. 114, 120 (1983) (per curiam).

The Eleventh Circuit has conflicting decisions. In Jacobs v. Singletary, 952 F.2d 1282, 1291 (11th Cir. 1992), the court held that the issue was a mixed question of fact and law. In Purvis v. Dugger, 932 F.2d 1413, 1418-19 (11th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1485 (1992) the court applied the presumption of correctness to the state court finding that the petitioner was not in custody. Neither of the decisions applied the analysis of Miller v. Fenton to the issue. Each simply cited a prior decision reciting general propositions regarding standards of review.

Thompson appears to rely on a split in the circuits regarding the standard of review applied on direct appeal to the

issue of Miranda custody. Most circuits, with little or no analysis, have applied the clearly erroneous standard of review to district court findings regarding custody. See e.g. United States v. Lanni, 951 F.2d 440, 441 & 443 (1st Cir. 1991); United States v. Mitchell, 966 F.2d 92, 98 (2nd Cir. 1992); United States v. Levy, 955 F.2d 1098, 1103 (7th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 102 (1992); United States v. Griffith, 922 F.2d 1343, 1347-48 (8th Cir. 1990); United States v. Robertson, 19 F.3d 1318, 1320-21 (10th Cir. 1994).

The only circuit which has held that the issue is a mixed question of fact and law is the Third Circuit: United States v. Calisto, 838 F.2d 711, 718 (3rd Cir. 1988). The continuing validity of this decision is in doubt. The court relied on the Ninth Circuit's first decision in United States v. Poole, 794 F.2d 462 (9th Cir. 1986). But the Ninth Circuit amended Poole and held that the issue was one of fact. United States v. Poole, 806 F.2d 853 (9th Cir. 1986). It is not clear what the Third Circuit will do if asked to reconsider Calisto in light of the latter Poole decision. It might be persuaded to follow the Ninth Circuit.

Thompson did not raise the issue on direct appeal; he raised it in the context of a habeas case. Only three circuit courts of appeals have addressed the issue in the habeas context, and one of those circuits has conflicting decisions. It is not clear how most of the circuits will apply the Miller v. Fenton analysis and decide the issue when the issue is squarely presented in a habeas case filed by a state prisoner. Moreover, it is not

clear how the circuits will resolve the issue if it is squarely presented on direct appeal. The issue needs more development in the circuits. Therefore, this Court should deny Thompson's petition. [1]

[1] This Court recently denied a petition for writ of certiorari in Tagala v. Prewitt, ___ U.S. ___, 115 S.Ct. 355 (1994), on the identical issue.

II. THE QUESTION DOES NOT WARRANT DISCRETIONARY REVIEW BY THIS COURT BECAUSE THOMPSON WILL NOT BE ENTITLED TO A NEW TRIAL EVEN IF HE PREVAILS

This Court in Brecht v. Abrahamson, 507 U.S. ___, 113 S.Ct. 1710 (1993), adopted the harmless error standard set forth in Kotteakos v. United States, 328 U.S. 750 (1946), for habeas cases. Under Kotteakos, a trial error requires a new trial only if it "had substantial and injurious effect or influence in determining the jury's verdict." 328 U.S. at 776.

Application of that standard leads to the conclusion that the admission of Thompson's statement to Investigator Stockard was harmless. The state's theory of the case was that Thompson murdered his former wife because he thought she might go to the police with information about his suspected drug dealing activities. Thompson did not testify at his trial. Thompson defended on the ground that he initially stabbed his former wife in self-defense; he claimed that he then lost control and killed his former wife in the heat of passion.

But Thompson's brother-in-law testified that Thompson said he kept Dixie around to keep her mouth shut, and that if he could "off the bitch" and get away with it, he would do it. Another witness related a conversation with Thompson that occurred before Dixie's body was found in which Thompson stated it was easy to kill someone and get rid of the body because he had done it.

Based on the evidence at trial which showed that Thompson had severely beaten and stabbed his former wife twenty-nine times and then attempted to get rid of her body, the testimony of these

witnesses regarding Thompson's statements about the murder were much more damaging than anything Thompson said in his statement to the troopers. The evidence against Thompson was overwhelming. Any error in admitting Thompson's statement did not have a substantial and injurious effect or influence on the verdict.

CONCLUSION

Thompson's petition for writ of certiorari should be denied.

Respectfully submitted this 8th day of December, 1994.

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Cynthia M. Hora
Cynthia M. Hora
Assistant Attorney General

LB PV

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No. 94-6615

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

JAN 13 PAGE 12

CARL THOMPSON,

Petitioner,

vs.

PATRICK KEOHANE, Warden,
BRUCE M. BOTELHO, Attorney General,
State of Alaska,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

CARL THOMPSON
Petitioner
In Pro Per
Reg. No. 90712-011 (C-Unit)
3901 Klein BLVD.
Lompoc, CA. 93436

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REASONS FOR GRANTING THE WRIT

I. THE SPLIT IN THE CIRCUIT COURT'S APPLIED TO TRIAL COURT DETERMINATIONS OF CUSTODY SHOULD BE RESOLVED AT THIS TIME.

The Respondent does not really argue the split in the Circuit Court's, but instead relies on Miller v. Fenton, 474 U.S. 104, in determining whether a issue is one of fact or law in the habeas context.

Respondent's contention that the Miller case supports the Ninth Circuit's conclusion, when it held that a state court's determination of when a person was not in custody for Miranda purposes was a factual one.

While Petitioner to a point agrees with the methodology in Miller v. Fenton, 474 U.S. ante, Respondent's argument fails, because facts such as the lenght and circumstances of the interogation, the defendant's prior experience with the legal process, and familiarity with the Miranda warnings are inline with §2254(d), but once such underlying factual issues have been resolved, and the moment comes for determining whether, under the totality of the circumstances Miranda was violated in a manner inconsistent with the constitution, the state court judge is not in an appreciably better position than the federal habeas court to make that determination.

Furthermore, Miranda warnings or lack of a warning, almost always occur not in open court, but in a controlled , secret police dominated environment. Miranda v. Arizona, 384 U.S. at 458, 16 L Ed 2d 709, 86 S.Ct. 1602.

The Ninth Circuit erred when it appled a clearly erroneous standard in Petitioner's case, because it never applied the law to the facts, see the courts memorandum, (Appendix C).

The conclusions reached in Cobb v. Perini, 832 F.2d 346 (6th Cir. 1987), support Petitioner's contention that the question of custody should be treated as a legal determination, see Cf. Sullivan v. State of ALA., 666 F.2d 479 (11th Cir. 1982).

The Eleventh Circuit reviews the issue of custody as a mixed question of law and fact and applies the law to the facts; citing U.S. v. Torkington, 874 F.2d 1445 (11th Cir. 1989); Jacobs v. Singletary, 952 F.2d 1288 (11th Cir. 1992). Jacobs, was a case coming to the Eleventh Circuit from a state court on habeas. The Eleventh Circuit stated: "The district [sic] in its review however, incorrectly accorded the state court's findings a presumption of correctness pursuant to 28 U.S.C.A. §2254(d)." Supra, at 1288, "The question of whether a prior statement is consistant with trial testimony is a mixed question of law and fact and thus reviewable de novo," Davis v. Heyd, 479 F.2d 446-449 (5th Cir. 1973)." Citing Jacobs v. Singletary, supra at 1288.

The Third Circuit also agrees that a custody determination "is a legal term of art central to Miranda jurisprudence, and a decision whether on not 'custodial interrogation' occurred is a matter of law to be determined in accordance with the policies underlying the Miranda rule." United States v. Mesa, 638 F.2d 591 n.3 (3rd Cir. 1980); United States v. Rioseco,

845 F.2d 299-302 (11th Cir. 1988).

In U.S. v. Ceballas, 812 F.2d 46-47 (2nd Cir. 1987), the court found that what a reasonable person would think is reviewable as a question of law, but is entitled to some difference because the determination is inextricable intertwined with the credibility of the witnesses.

"[I]n First Amendment lible cases, the relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of the law." Citing Miller v. Fenton, 474 U.S. at 114 (citation omitted).

There is also a due process element that is present in the Miranda custody issue, that is closely intertwined with the voluntariness issue:

> "[T]actics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness. Indeed, even after holding that the Fifth Amendment privilege against compulsory self-incrimination applies in the context of custodial interogation, (citation omitted) the Court has continued to measure confessions against the requirements of due process." (Citation omitted). Citing Miller v. Fenton, 474 U.S. at 110 (1985).

Due process is further compromised when a suspect is taken into custody or his freedom of movement is restricted, such that a reasonable person would not feel free to leave. Citing Miranda v. Arizona, 384 U.S. at 741; dissenting opinion by the Honorable Justice, Harlan, Justice Stewart and Justice White.

Respondent next argues, that Petitioner failed to raise this issue on direct appeal, and thus should be barred from doing so now.

Respondent's argument is groundless and is nothing more than subterfuge designed to impede justice. Citing this Court's holding in, Fay v. Noia, 372 U.S. 391, 9 L ed 2d 837, 83 S.Ct. 822 (1963), where this Court stated:

> "[C]onventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." Id., at 860.
>
> "Jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceeding." Id., at 861-62 (Citation omitted).

II. THE HARMLESS ERROR RULE SHOULD NOT BE APPLIED IN THIS CASE.

And finally, Respondent argues that Petitioner's Writ does not warrant discretionary rewiew by this Court, because it falls under the "harmless error rule" st forth in Brecht v. Abrahamson, 507 U.S. ____, 113 S.Ct. 1710 (1993).

Petitioner for one, never took the stand in his defense, so his confession could not be used to impeach him if the instant case was overturned on remand.

Second, the harmless error rule was never raised in a previous court. The trial court in particular, never found harmless error applicable, so it should not be considered now.

Furthermore, it would frustrate this Court in addressing this issue, as it should be for the lower court to decide on remand.

The Respondent has not met the burden of proving that Petitioner's confession did not have a substantial and injurious effect or influence in determining the jury's verdict.

So, harmless error analysis should not be considered at this time.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the divergence in the Circuit Court's on the correct standard of review in the Miranda custody context. 1/

Dated: 12/21/94

Carl Thompson
Petitioner

1/ If this Court elects not to address the issue presented in this writ at the present time, it is requested the the writ issue and that the matter be remanded to the Ninth Circuit Court of Appeals for redetermination in light of the Eleventh Circuit's opinion in Jacobs v. Singletary, 952 F.2d 1288 (11th Cir. 1992).

William K. Suter
Clerk of The Court
United States Supreme Court
One First Street, NE
Washington, DC 20543

December 21, 1994

Re: Thompson v. Keohane, et al.
No. 94-6615

Dear Clerk:

Please find enclosed: Twelve (12) copies of Petitioner's Reply Brief; one (1) copy of the Certificate of Service.

Clerk, would you please make sure to include, (C-Unit) on all of my correspondence coming from the Court. It has been left out of my address in the past and has resulted in a significant delay in my mail reaching me.

Thank you very much.

Sincerely,

Carl Thompson

No. 94-6615

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

CARL THOMPSON,

Petitioner,

Vs.

PATRICK KEOHANE, Warden,
BRUCE M. BOTELHO, Attorney General,
State of Alaska,

Respondent.

CERTIFICATE OF SERVICE

Petitioner, Carl Thompson, certifies that pursuant to Rule 29, I served Respondent with one (1) copy of Petitioner's Reply Brief, by mailing the said copy, in a envelope, First Class mail, postage pre-paid, addressed to the following:

Cynthia M. Hora
Assistant Attorney General
Office of Special Prosecutions
and Appeals
Alaska Department of Law
310 K Street, Suite 308
Anchorage, Alaska 99510

Signed under penalty of perjury this 21st day of December, 1994.

Carl Thompson

CARL THOMPSON
Petitioner

(5)

No. 94-6615

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CARL THOMPSON,
Petitioner,

v.

PATRICK KEOHANE, Warden
BRUCE M. BOTELHO, Attorney General,
State of Alaska,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 31, 1994
CERTIORARI GRANTED JANUARY 23, 1995

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RELEVANT DOCKET ENTRIES

Date	Proceedings
1991	
Apr 23	pet for writ of habeas corpus.
26	Motion referring case to Mag Judge Branson per rule 4/5/11.
May 24	ORDER directing deft to show cause why writ shldnt be grnted.
June 13	ORDER that deft have til 9/1/91 to file rspnse to petition for writ of
Aug 1	defts response to pet for writ of hab corp.
Sept 03	reply brief.
1992	
Feb 03	Fld MAG B MO dtd 2/3 that pltf cnsl have 15 days to file information required by L.R.3 or show cause why they shld be exempt.
1993	
Feb 18	petition DISMISSED.
June 17	notice of appeal.
23	certificate of prob.
23	Fld Deft's Opp. to late filed not. of appeal and mot. for prob. cause.
25	pltf aff of D. Dyer.
25	pltf aff of M. Friedman.
28	Fld pltf motion to vacate judg for reconsideration & time to file objs to initial R&R petition for habeas corpus w/att aff.
30	Fld defs opp to pltf mtn to vacate jmt, mtn for recnsdratn & mtn for addlt time to file objs to initial R&R.

Date	Proceedings
1993	
July 19	Fld ORDER re pltf mtn to vacate jmt & allow new 10 day period to file objs to MJ R&R GRANTED; mtn for cert of probable cause DENIED as not ripe. cc cnsl, MJ Branson.
29	Fld pltf obj to initial R&R re dsmsl of petition.
Sept 28	Fld MO re petitioners object to initial R/R referred to MJ B for a final R/R. Cy cnsl.
29	Fld MJ MO that MJ declines to modify int R&R & that this matter is now forwarded to trial judge. cc cnsl Judge Sedwick
Dec 8	Fld ORDER DENYING pltf's petition at #1. cc cnsl, MJ Branson.
09	FLD JMT dismissing petition. cy cnsl.
27	Fld Pltf's notice of appear to dkt #28. cc: cnsl, Judge Sedwick, 9CCA.
27	Fld Pltf's request for certificate of probable cause.
27	Fld Pltf's request to proceed in forma pauperis.
1994	
Jan 11	Fld MO petitioner request for certificate of probable cause is GRANTED.
11	Fld order GRANTING pltf's motion to proceed in F/P.
27	Fld cy 9CCA time schedule order. 94-35052.

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

No. 4FA-S86-02644 Cr.

STATE OF ALASKA,
Plaintiff,

v.

CARL K. THOMPSON,
Defendant.

MEMORANDUM DECISION

Defendant, Carl K. Thompson, has filed three motions.

1. Motion to Dismiss Count II, tampering with physical evidence (AS 11.56.610)

2. Motion to Suppress Evidence seized from residence

3. Motion to Suppress Statement taken Sept. 15, 1986

Facts

On August 11, 1986, defendant Carl K. Thompson (Thompson) stabbed his ex-wife (Dixie) and killed her. The stabbing took place at their residence at 15.1 Mile Chena Hot Springs Road. On the same date, Thompson disposed of Dixie's body in a gravel pit at 10.5 Mile on the Elliott Highway. He threw the knife and her personal belongings in a public dumpster at the Valley View Center located at 22.5 Mile Chena Hot Springs Road.

On September 10, 1986, Dixie's body was discovered. At the time of discovery, her identity was not known.

To assist in identifying the body, a press release was issued describing the body and requesting assistance in identifying it.

On the day of the press release, Thompson contacted the Alaska State Troopers and reported that his ex-wife Dixie had been missing since August 11, 1986, and she fit the description of the body that had been found.

The defendant gave a tape-recorded statement on September 11, 1986, at which time he appeared cooperative and expressed concern for the victim's well-being. On September 12, 1986, the defendant Thompson gave another statement expressing his desire to cooperate with the police in solving the murder.

Investigator Stockard of the Alaska State Troopers con tacted Thompson on September 15, 1986, by telephone requesting that he come to trooper headquarters to identify property that the police believed belonged to Dixie. Thompson came to Alaska State Trooper headquarters and was interviewed by Investigator Stockard and Investigator Hard. Thompson identified the property that had been recovered as belonging to Dixie and continued to talk to the troopers concerning the deceased.

During the course of the interview, Thompson confessed to killing Dixie.

Motion to Dismiss Count II—Tampering with Physical Evidence

Defendant claims that since, at the time the body was thrown in the gravel pit and the knife in the dumpster there was no investigation pending, he can not be convicted of tampering with physical evidence.

AS 11.56.610 provides in pertinent part:

> A person commits the crime of tampering with physical evidence if the person (1) destroys, mutilates, alters, suppresses, conceals, or removes physical evidence with intent to impair its verity or availability in an official proceeding or a criminal investigation: . . . . (4) does any act described by (1), (2), or (3) of this subsection with intent to prevent the institution of an official proceeding.

There is no requirement under subparagraph (4) that an official proceeding be in progress. The intent required is to prevent the institution of an official proceeding. *Williamson v. State*, 692 P.2d 965, 974 (Alaska App. 1984).

Therefore, defendant's Motion to Dismiss Count II, Tampering with Physical Evidence is DENIED.

Motion to Suppress Evidence Seized from Residence

Defendant has filed a motion to suppress evidence seized from his residence at 15.1 Mile Chena Hot Springs Road pursuant to search warrant numbered SW-237.

According to court documents, search warrant numbered SW-237 was never executed. Instead, a new search warrant numbered SW-239 was issued. SW-239 was issued based on the affidavit for SW-237 as well as additional testimony of Investigator Christopher Stockard. That search warrant was served on September 15, 1986.

Since SW-237 was never executed, defendant's Motion to Suppress Evidence Seized from Residence pursuant to SW-237 is DENIED.

Motion to Suppress Statement

Defendant has moved to suppress the statement which was taken on September 15, 1986. In the statement he admits to stabbing Dixie and disposing of her body. Thompson claims that the statement should be suppressed because he was not given a *Miranda* warning prior to the interrogation. He further claims that the interrogation was overbearing and the statement was a product of psychological coercion, and therefore not voluntary.

At the time of the interrogation by Investigator Stockard and Investigator Hard on September 15, 1986, Thompson had become the focus of the investigation and in fact Investigators Stockard and Hard believed he had killed Dixie and disposed of her body. A search warrant had been issued for Thompson's residence and truck prior to his interview on the 15th. In fact, the search of Thompson's residence pursuant to the search warrant had commenced prior to Investigator Stockard requesting him to come to police headquarters and was still in progress during the course of the interview.

After the body was identified, the police briefly questioned Thompson on two occasions prior to September 15. On the 15th he was asked to come to the Alaska State Troopers' headquarters on Peger Road to identify certain items believed to belong to the deceased. The telephone call requesting him to come to the policy station was recorded. Thompson went to the police station in his own vehicle. On arrival, he was told he was free to leave at any time.

The entire interrogation, which lasted approximately two (2) hours was tape-recorded and was conducted by Investigators Stockard and Hard who were dressed in plain clothes with no weapons visible. On several occasions throughout the interrogation, Thompson was assured that he was not in custody, not under arrest and could leave at any time. During the interview Thompson asked questions to reassure himself that this was in fact the case and in fact at the conclusion of the interrogation, even after admitting to stabbing Dixie, he was permitted to leave. His truck was seized at the conclusion of the interview in order to be searched for evidence. After the interview was over, a trooper drove him to his residence. He was arrested approximately two hours later pursuant to an arrest warrant which was requested by Investigator Stockard based on the affidavits for the search warrant for his residence and vehicle and the statement made on the 15th.

At the time of the interrogation on September 15, 1986, Investigator Stockard knew Thompson was awaiting sentencing on a felony theft case. In the theft case he was represented by retained counsel and had entered a plea of no contest to the charge. Investigator Stockard assumed Thompson knew he had a right to remain silent and not talk to the officers.

During the interview, Thompson was advised that anything Thompson told them favorable to his case would be brought to the attention of the District Attorney as well as the grand jury and they would investigate any leads favorable to Thompson.

The information supplied by Thompson, namely, that it was self-defense or heat of passion was furnished to the District Attorney as well as the grand jury.

Alaska has adopted an objective, reasonable person perspective as a standard for determining whether an interviewed person is in custody. *Hunter v. State*, 590 F.2d 388, 395 (Alaska 1970). The test must be applied on a case-by-case basis. Short of an actual arrest, a person will be deemed "in custody" when "a reasonable person would feel he was not free to leave and break off police questioning." (*Ibid.* at 895) There are a number of factors to be considered in making this "in custody" determination. *When* and where it occurred, how long it lasted, how many police officers conducted the interrogation, what was said and done, whether or not there were actual physical restraints or indicia of physical restraints, and whether the defendant was being questioned as a suspect or witness. The court must also consider how the defendant got to the police station, whether it was on his own, in response to a police request or escorted by the police and whether or not he was permitted to leave after the statement.

In this case, the defendant appeared in response to a request by the troopers to identify certain personal items

of his ex-wife. The interrogation was conducted by two plain-clothed police officers without any signs of weapons. Thompson was assured that he was free to go at any time and in fact at the conclusion of the interrogation was not arrested and was driven home by Investigator Hard.

During the course of the interview, the defendant by his questioning, reaffirmed the fact that the police would permit him to leave.

In applying the *Hunter* test to the facts of this case, the court concludes that the defendant was not in custody and *Miranda* warnings were not required.

This does not end the inquiry since the defendant has also asserted that his statement was not voluntary based on the type of questioning and the mental coercion involved. The court must apply a totality of circumstances test in making a decision on the voluntary nature of the statement. The state must show by a preponderance of the evidence that confession was voluntary. *Sprague v. State*, 590 P.2d 410, 413 (Alaska 1979).

From an examination of the overall circumstances of the interrogation in this case, the state has met its burden and the statement was in fact voluntary. Therefore, defendant's Motion to Suppress the statement taken on September 15, 1986, is DENIED.

The court has examined the statement of September 15, 1986, made by Thompson as viewed by an objective reasonable person at the time the statement was made, that is, whether or not he as a reasonable person would believe he was free to leave. The court has concluded that Thompson as a reasonable person would feel he could leave. However, in viewing the conduct of the police after the statement, that is, arresting the defendant by means of a warrant within two hours of the statement, appears to be a devious police tactic. It would appear that the police felt they could obtain a statement implicating the defendant by doing so, letting him return home and arrest him immediately.

Under the total circumstances of this case, that fact alone does not made the confession inadmissible, although makes the question very close.

DATED at Fairbanks, Alaska this 17 day of March, 1987.

/s/ Jay Hodges
JAY HODGES
Superior Court Judge

COURT OF APPEALS OF ALASKA

No. A-2183

CARL THOMPSON,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Jan. 20, 1989

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

OPINION

COATS, Judge.

Carl Thompson was convicted, following a jury trial, of one count of first-degree murder, AS 11.41.100, an unclassified felony, and of one count of tampering with physical evidence, AS 11.56.610, a class C felony. Judge Jay Hodges sentenced Thompson to ninety-nine years on the first-degree murder conviction and to a consecutive five years on the tampering with physical evidence conviction. Thompson appeals his conviction and sentence. We affirm Thompson's conviction, but reverse his sentence.

On September 10, 1986, two moose hunters found the body of a dead woman floating in a gravel pit lake off the Elliott Highway. The hunters notified the Alaska State Troopers. The troopers discovered that the woman

had been stabbed twenty-nine times. The body had been thrown into a water-filled gravel pit after being wrapped in chains, a bedspread, and a tent fly. The troopers advertised for information concerning the identity of the body, and directed the public's attention to a unique tattoo on the body. At the urging of his girlfriend, Carl Thompson called the troopers and reported that his former wife fit the description of the body which they had found and told the troopers that she had been missing since mid-August. Thompson told the troopers that he had taken his former wife to the airport in mid-August and that he had not seen her again. Through a dental examination, the body was conclusively identified as Thompson's former wife, Dixie Thompson.

On September 15, 1986, the trooper investigation had focused upon Carl Thompson as the person who had killed Dixie Thompson. Trooper Cris Stockard contacted Thompson and asked him to come to the trooper office to identify some property belonging to Dixie Thompson. However, Trooper Stockard's primary reason for contacting Thompson was to question him. Thompson went to the police station and was questioned extensively by Trooper Stockard. During the questioning, Trooper Stockard consistently assured Thompson that he was not under arrest and that he was free to go at any time. Thompson ultimately confessed to killing his former wife. Following his statement to the troopers, Thompson was allowed to leave the trooper headquarters. However, he was arrested approximately two hours later and was charged with murder in the first degree.

While Trooper Stockard was interviewing Thompson at the trooper headquarters, other troopers were executing a search warrant at Thompson's residence on Chena Hot Springs Road. The troopers seized a handgun during the search. Additionally, Luminol testing was done to check for the presence of blood in the residence. The test revealed a large concentration of blood in the kitchen

area of the residence. The troopers also seized Thompson's truck. The tires of Thompson's truck were of similar size and tread design to the tire impressions that the troopers had found near where Dixie Thompson's body had been discovered.

At trial, Thompson defended on the ground that he initially stabbed Dixie Thompson in self-defense. Thompson claims that he then lost control and killed Dixie in the heat of passion. Thompson asked the jury to convict him of the lesser-included offense of manslaughter. The jury ultimatey convicted Thompson of murder in the first degree.

During deliberations, the jury sent a note to Judge Hodges asking for clarification of Jury Instruction No. 14.[1] The note stated:

> We need a legal interpretation of Page 14 referring to "serious provocation" [sic] "Can an introxicated [sic] person use serious provocation and/or Heat of Passion as a means of Defense."

The judge instructed the jury as follows:

> An intoxicated defendant can avail himself of the heat of passion and serious provocation defense but his conduct must be judged by how a reasonable sober person in the defendant's situation would react.

Defense counsel stipulated to that answer being given in response to the jury's question. Defense counsel, however, went on to argue that an additional instruction should be given on diminished capacity based on intoxication. After hearing argument from the defense and the prosecution, Judge Hodges declined giving any further instruction on intoxication.

Thompson argues that it was reversible error for the trial\court to refuse to instruct the jury on a defense of diminished capacity based on intoxication. He suggests that the instruction was mandatory and requires reversal if it is "possible that [this] omission contributed to the jury's verdict[.]" *Stork v. State*, 559 P.2d 99, 101 (Alaska 1977).

At trial, Thompson's defense was that he was guilty only of the lesser-included offense of manslaughter because he acted in the heat of passion. Thompson also defended on the ground that he had diminished capacity to form an intent to kill based upon a mental disease or defect. However, it is clear that Thompson did not assert, prior to jury deliberation, the defense of diminished capacity based upon intoxication. He argues, however, that because the state contended that he was intoxicated when he committed the offenses and suggested that he was a mean angry drunk, such an instruction should have been given.

---

[1] Jury Instruction No. 14 stated:

> It is a defense to Murder in the First Degree, and Murder in the Second Degree involving intent to cause serious physical injury OR knowing conduct, if the defendant acted in a heat of passion at the time he killed Dixie Gutman Thompson before there had been a reasonable opportunity for the passion to cool, when the heat of passion resulted from a serious provocation by the intended victim.
>
> "Heat of passion" as the term is used in our law means such passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same or similar circumstances as those in question, and such as would cause him to act rashly, without reflection and deliberation, and from passion rather than judgment. "Passion" or "heat of passion" is a term which encompasses a broad range of intense emotions including, but not limited to, fear, fright, terror, anger, rage or wild desperation.
>
> "Serious provocation" as used in these instructions means conduct which is sufficient to excite an intense passion in a reasonable person in the defendant's situation, other than a person who is intoxicated, under the circumstances as he reasonably believed them to be. Insulting words, or hearsay reports of conduct engaged in by the intended victim, do not alone or in combination with each other, constitute serious provocation.

Both Thompson and the state cite *Des Jardins v. State*, 551 P.2d 181 (Alaska 1976). In *Des Jardins*, the supreme court stated:

> When a jury asks a judge about a matter on which it has received adequate instruction, the judge may in his or her discretion refuse to answer, or may refer the jury to the earlier instruction. When, however, the jury appears to be confused about a legal issue, and the resolution of the question is not apparent from an earlier instuction, the trial judge has a "responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties, a trial judge should clear them away with concrete accuracy."

Id. at 190 (footnote omitted).

In addition, Thompson cites to III *Standards for Criminal Justice* § 15-4.3 (2d ed. 1986). However, the Commentary to Standard 15-4.3(b) provides in part: "It is generally agreed that, when giving instructions in response to a jury request, the judge may confine himself or herself to the particular questions asked by the jury and need not give additional instructions, even though requested to do so by the defendant." *Id.* (footnote omitted).

We conclude that Judge Hodges did not abuse his discretion in refusing to instruct the jury on the defense of diminished capacity due to intoxication. Thompson's main defense was that he acted in the heat of passion and was therefore guilty of manslaughter, rather than first-degree murder. The jury question focused on this defense and asked the judge whether a person who was intoxicated could avail himself of heat of passion as a defense. Judge Hodges' instruction directly answered the jury's question. Thompson never argued that he was incapable of forming an intent to kill based on diminished

capacity due to intoxication. Although there was evidence that suggested that Thompson had been intoxicated during the events which ultimately led to Dixie Thompson's death, neither the state nor Thompson had suggested that Thompson was incapable of forming a specific intent to kill. There is no reason to believe that the jury independently was focusing on this issue. Rather, the jury seems to have focused on the major defense which Thompson raised. We find no abuse of discretion.

Prior to trial, Thompson argued that the statement which he made to Trooper Stockard on September 15, 1985, should be suppressed. Thompson argued in the trial court that the troopers were required to give him *Miranda* warnings before he talked to them and contended that his statement was not voluntary. Judge Hodges found that the troopers were not required to give Thompson *Miranda* warnings because Thompson was not in custody at the time that he made the statement. He also found that Thompson's statements to the troopers were voluntary.

In *Hunter v. State*, 590 P.2d 888 (Alaska 1979), the supreme court held that the police were required to give a person *Miranda* warnings where he was subject to custodial interrogation. The court adopted an objective reasonable person test for determining whether a suspect was in custody. *Id.* at 895. The court asked:

> At least three groups of facts would be relevant to this determination. The first are those facts intrinsic to the interrogation: when and where it occurred, how long it lasted, how many police were present, what the officers and defendants said and did, the presence of actual physical restraint on the defendant or things equivalent to actual restraint such as drawn weapons or a guard stationed at the door, and whether the defendant was being questioned as a suspect or as a witness. Facts pertaining to events before the interrogation are also rele-

> vant, especially how the defendant got to the place of questioning—whether he came completely on his own, in response to a police request, or escorted by police officers. Finally, what happened after the interrogation—whether the defendant left freely, was detained or arrested—may assist the court in determining whether the defendant, as a reasonable person, would have felt free to break off the questioning.

Id. at 895 (footnotes omitted). *See also Quick v. State*, 599 P.2d 712 (Alaska 1979); *Lowry v. State*, 707 P.2d 280 (Alaska App. 1985).

In arguing that Judge Hodges erred in finding that the police were not required to give Thompson *Miranda* warnings, Thompson does not really argue that he was in custody when the interview occurred. He concedes that "[he] may or may not have been in a custodial setting at the time he was interrogated." Instead, Thompson argues that the police intentionally interrogated him in such a way as to circumvent the requirements of *Miranda*. He contends that the police went out of their way to set up circumstances where Trooper Stockard's questioning of Thompson would not be custodial so that Troper Stockard would not have to give Thompson *Miranda* warnings. In his written decision finding against Thompson on this issue, Judge Hodges appears to have found that the police intentionally arranged to interrogate Thompson in a non-custodial manner to increase the likelihood that they would get a statement from him. Judge Hodges described this as a "devious police tactic." However, Judge Hodges concluded that the proper test was whether a reasonable person would believe that he was free to leave. Judge Hodges concluded that Thompson, as a reasonable person, would have felt free to break off the interrogation and leave. It seems clear that Judge Hodges applied the correct test under *Hunter*. As we have pointed out earlier, Thompson does not really

contend that he was in custody at the time that he was questioned by Trooper Stockard. Thompson, responding to Trooper Stockard's request, went to the trooper headquarters on his own. Trooper Stockard assured Thompson numerous times that he was free to leave, that he was not under arrest, and that after the questioning finished, Thompson was free to go. And, in fact, Thompson was allowed to leave after the interrogation ended. Under these circumstances, we agree with Judge Hodges that the appropriate test is the one set forth by the supreme court in *Hunter*. Applying the *Hunter* test, it seems clear that Thompson was not in custody and that the police were not required to give Thompson *Miranda* warnings.

Thompson next argues that his statement was not voluntary. Thompson's primary complaint is the manner in which the troopers conducted the interview. Thompson points out that the troopers played on his sympathies, minimized his guilt, and placed much of the blame for the homicide on the victim. Trooper Stockard told Thompson that it was important for Thompson to tell his side of the story so that Trooper Stockard could present that version to the district attorney. Trooper Stockard warned Thompson that if he did not say anything, the district attorney might conclude that Thompson had committed murder in the first degree. Trooper Stockard suggested that if Thompson gave his side of the story, it was possible that Thompson might only be guilty of a lesser charge, such as negligent homicide, and would be facing a minimal sentence such as two to five years.

In his brief, Thompson sets out the correct legal standard for reviewing the voluntariness of confessions: "The Supreme Court has consistently made clear that the test of voluntariness is whether an examination of all the circumstances discloses that the conduct of law enforcement was such as to overbear [the defendant's] will to resist and bring about confessions not freely self deter-

mined." *Stobaugh v. State*, 614, P.2d 767, 772 (Alaska 1980) (quoting *United States v. Ferrara*, 377 F.2d 16, 17 (2nd Cir.1967)).

In *Sprague v. State*, 590 P.2d 410 (Alaska 1979), the Alaska Supreme Court articulated a test for determining whether a confession was voluntary or involuntary. The court held that "[i]n determining whether a confession is voluntary or is the 'product of a mind overborne by coercion,' this court has previously stated that it will consider the 'totality of circumstances surrounding the confession' and conduct an independent review of the record." *Id.* at 413 (footnote omitted). In considering the totality of the circumstances, the following are relevant criteria: (1) age, mentality, and prior criminal experience; (2) length, intensity, and frequency of interrogation; (3) the existence of physical deprivation or mistreatment; and (4) the existence of threat or inducement. *Id.* at 414.

In *Harris v. State*, 678 P.2d 397 (Alaska App.1984), *rev'd on other grounds, Stephen v. State*, 711 P.2d 1156 (Alaska 1985), this court dealt with the issue of inducement. The police told Harris that if he cooperated with them by telling the truth, his cooperation would be brought to the attention of the prosecutor. This court concluded that such "inducement is not improper as long as, under the totality of the circumstances, the defendant's confession is voluntary." *Id.* at 405-06. *See also Plant v. State*, 724 P.2d 536, 541 (Alaska App. 1986) (defendant's confession voluntary and will not overborne even though defendant was told by police that he was in a lot of trouble and that he might benefit from cooperation).

Thompson was twenty-nine years old at the time he made the confession. Thompson argues that he dropped out of high school and that he was "borderline retarded." However, Dr. Feldman, the psychologist and defense witness who testified about Thompson's retardation, actually testified that he believed that Thompson was of

low average intelligence. Dr. Feldman testified that Thompson's scores on the intelligence tests were inaccurate on the low side because of the circumstances under which the tests were given.

Thompson has had "prior criminal experience." He was convicted of minor in possession in 1975; receiving or concealing stolen property in 1976; disorderly conduct in May 1986; and second-degree theft in October 1986. Thompson was dealing with the police on the theft offense prior to his interrogation.

Thompson went voluntarily to the police station at the request of the troopers. He was not advised of his *Miranda* rights. He was, however, advised several times that he was free to leave during the interview, prior to his confessing. The interview lasted about two hours. He was interviewed by two troopers in a small interview room. Neither trooper was in uniform, nor were guns displayed.

The statements which the police made to Thompson to encourage him to talk to them appear to be similar to the inducements which we concluded were not improper in *Harris* and in *Plant*. We conclude that the inducements which the police made to Thompson were not "such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined." We conclude that Thompson's confession was voluntary.

During the trial, the state played the portion of Thompson's statement where he admitted killing his former wife. Thompson asked to have the entire statement played to the jury. Judge Hodges concluded that the portion of the statement that was played was a fair assessment of what occurred and ruled against playing the first portion of the tape. Thompson points to Alaska Evidence Rule 106, which states:

Remainder of, or Related Writings or Recorded Statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

The decision whether to admit or to exclude evidence under A.R.E. 106 is reviewed under an abuse of discretion standard. *Stumpf v. State*, 749 P.2d 880, 899 (Alaska App.1988). In *Stumpf*, we held that:

> [W]hen the state . . . presents one part of a conversation or statement . . . , the defendant may be entitled to offer or require the state to offer, the rest of the statement or conversation in order to set the context for statements already in evidence. Nonetheless, the admitted portions of the statements need not be admitted if they are not relevant to explain or clarify the previously admitted statement.

Id. (citation omitted).

The statement which Thompson wished to admit in its entirety was an approximate two-hour interview. Much of that interview consisted of Trooper Stockard talking to Thompson. Under these circumstances, we conclude that Judge Hodges did not abuse his discretion in determining that, on direct examination, the state could introduce only the part of the statement where Thompson admitted killing his former wife. Judge Hodges indicated that he might or might not permit certain portions of the statement to be played to the jury during cross-examination. Thompson has not pointed out to us specific portions of the tape which he was not permitted to play to the jury either for purposes of cross-examination or as evidence during his case-in-chief. We conclude that Judge Hodges did not err in limiting the portion of the

tape which was played to the jury during the state's case-in-chief.

Thompson next contends that his sentence was excessive. Thompson was convicted of murder in the first degree, which is an unclassified felony with a maximum penalty of ninety-nine years and a minimum penalty of twenty years. He was also convicted of tampering with physical evidence, which is a class C felony with a maximum penalty of five years. Judge Hodges sentenced Thompson to the maximum sentence on both convictions, and imposed those sentences consecutive to each other. Thus, Thompson has a composite sentence of one hundred and four years.

At the time of sentencing, Thompson was thirty years old. Thompson had previously been convicted of four minor misdemeanor offenses. Thompson was not sentenced to imprisonment on any of the misdemeanor offenses. At the time that he committed the present offense, Thompson was charged with theft in the second degree, a class C felony, AS 11.46.130(a)(1). Thompson was ultimately sentenced to three years with two and one-half years suspended on the theft offense. In sentencing Thompson, Judge Hodges concluded that Thompson might not be a worst offender because he did not have a long history of criminal involvement. However, he classified the murder itself as a worst offense. He emphasized the explosive relationship that existed between Carl and Dixie Thompson throughout the course of their relationship.

Judge Hodges indicated that there was evidence that Thompson was at least involved with the use of drugs for his personal use and that a possible motive for the killing may have been that Thompson was concerned that Dixie Thompson might inform on him. Judge Hodges indicated that he had difficulty believing Thompson's version that he acted either in self-defense or in the heat of passion because Thompson's version of the

offense did not match the physical evidence. In concluding that this was a particularly aggravated murder offense, Judge Hodges pointed out that Thompson had stabbed his former wife twenty-nine times. Thompson then disposed of the body by taking it to a gravel pit in an isolated area and wrapping the body with canvas and chains.

We conclude that Judge Hodges was not clearly mistaken in imposing the maximum sentence of ninety-nine years for murder in the first degree. In *Riley v. State*, 720 P.2d 951, 952 (Alaska App.1986), we pointed out that we were not aware of any decision of this court or the Alaska Supreme Court which held that a maximum sentence for murder in the first degree was excessive. In *Riley*, we pointed out that under the present first-degree murder statute, many cases which would have been second-degree murder under the former statutes were now included as murder in the first degree. We stated that "[i]n such cases, sentence appeals dealing with second-degree murder convictions under prior law may well provide an appropriate point of reference." *Id.* at 952 n. 1. In the instant case, however, we believe that the reasons which Judge Hodges gave were sufficient to justify imposition of the maximum sentence.

We do not believe, however, that the record supports imposing the sentence for tampering with evidence consecutively to the ninety-nine-year murder sentence. In order to justify imposing a sentence consecutive to the ninety-nine-year murder sentence, the trial court would have to find that confinement of the defendant for the aggregate period of the consecutive sentence was necessary to protect the public. *Mutschler v. State*, 560 P.2d 377 (Alaska 1977).[2] We do not believe that a sentence

[2] In *State v. Andrews*, 707 P.2d 900, 908, 910 (Alaska App.1985), *aff'd per curiam*, 723 P.2d 85 (Alaska 1986), we concluded that AS 12.55.025(e) established a legislative preference for consecutive sentences. In *Jones v. State*, 744 P.2d 410, 411 (Alaska App.1987), we indicated that the legislative preference for consecutive sentences must be interpreted to expand the situations where the court may impose consecutive sentences. In *Jones*, we upheld the trial judge's conclusion that Jones' offenses were so serious that a consecutive sentence was necessary to reflect the seriousness of the crime. *Jones*, 744 P.2d at 412. However, we do not believe that the record in this case establishes any substantial reason for imposing a sentence greater than the ninety-nine year maximum sentence for first-degree murder.

in excess of ninety-nine years can be justified except where the trial court finds that in order to protect the public the defendant must spend the rest of his life in prison without any possibility of parole. *See, e.g., Nukapigak v. State*, 663 P.2d 943 (Alasaka 1983); *Hasting v. State*, 736 P.2d 1157 (Alaska App.1987). Where the record did not support this finding, we have previously not approved sentences in excess of the ninety-nine-year maximum term for murder. *Ridgley v. State*, 739 P.2d 1299 (Alaska App.1987); *Page v. State*, 657 P.2d 850 (Alaska App.1983).

Judge Hodges did not find that it was necessary to sentence Thompson to spend the rest of his life in prison without any possibility of parole to adequately protect the public. We do not believe that the record in this case would support such a finding. We do not believe that the record supports the conclusion that Thompson must be incarcerated for the remainder of his life without any possibility of parole. We accordingly conclude that the trial court should not have imposed the sentence for tampering with physical evidence consecutively to the ninety-nine-year sentence for murder. We therefore find Thompson's sentence to be clearly mistaken. We order the trial court to impose Thompson's sentence for tampering with evidence concurrent to his sentence for murder.

The conviction is AFFIRMED. The sentence is VACATED and the case is REMANDED for resentencing consistent with this opinion.

IN THE SUPREME COURT
OF THE STATE OF ALASKA

Supreme Court No. S-3200

CARL THOMPSON,
Petitioner,

v.

STATE OF ALASKA,
Respondent.

Court of Appeals No. A-2183
Trial Court No. 4FA 86-2644 Cr.

Before: Matthews, Chief Justice, Rabinowitz, Burke and Compton, Justices. [Moore, Justice, not participating.]

ORDER

On consideration of the petition for hearing, filed on March 6, 1989, and the response to the petition, lodged on March 28, 1989 and filed pursuant to the order of March 31, 1989,

IT IS ORDERED:

The petition for hearing is denied.

Entered by direction of the court at Anchorage, Alaska on May 4, 1989.

/s/ David A. Lampen
DAVID A. LAMPEN
Clerk of the Supreme Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. A91-171 Civil

CARL THOMPSON,
Petitioner,

v.

JOSEPH CLASS, *et al.*,
Defendants.

INITIAL REPORT AND RECOMMENDATION RE: PETITION FOR HABEAS CORPUS

Carl Thompson, presently serving a life sentence for first degree murder following a conviction in an Alaska state court, has filed a habeas corpus petition under 28 U.S.C. § 2254 in which he claims his Constitutional rights to due process and against self-incrimination were violated when his involuntary confession was admitted at trial during the prosecution's case-in-chief. This Court, having reviewed the petition, the memorandum in support thereof, and exhibits attached thereto, including a transcript of petitioner's statements to the police, the state's response thereto and petitioner's reply, and having heard argument thereon, now makes its Report and Recommendation.

FINDINGS OF FACT

1. In 1987, in the Alaska Superior Court in Fairbanks, Alaska, petitioner was convicted by a jury on one count of first-degree murder and one count of tampering with physical evidence. He was subsequently sentenced to ninety-nine years on the first-degree murder conviction and an additional five years on the tampering charge to be served consecutively. The Alaska Court of Appeals affirmed the convictions, found the consecutive five year

sentence for tampering to be excessive and remanded for resentencing. On remand, the trial court resentenced petitioner to a term of 99 years.

2. Petitioner moved to suppress the tape recorded confession he made to two Alaska State Troopers before trial on the grounds that the interrogation violated his fifth amendment *Miranda* rights; and that his resulting confession was involuntary. The motion was denied. At trial, during the prosecution's case-in-chief, a portion of the tape recorded confession in which he admitted stabbing his ex-wife was played to the jury.

3. Petitioner has exhausted his available state court remedies.

4. On September 10, 1986, the body of a woman was found floating in a lake off the Elliott Highway by two moose hunters. The woman had been severely beaten and stabbed a total of twenty-nine times. She was clad only in a T shirt and wrapped in chains, a bedspread and tent fly. There was a heart-shaped tatoo with the name "Carl" over her left chest. After the Alaska State Troopers advertised for information concerning the identity of the body, Carl Thompson telephoned the troopers and reported that the description fit his former wife who had been missing since that August. A subsequent dental examination conclusively identified the body as Thompson's former wife, Dixie.

5. On September 15, 1986, after questioning Thompson's brother-in-law and another witness, the Alaska State Troopers' investigation focused on Thompson as the most likely person to have killed Dixie Thompson.

6. Intending to question Thompson about the murder, Trooper Stockard contacted him and asked him to come in to the trooper headquarters on the pretext of identifying a coat, some jewelry boxes and jewelry that might have belonged to his former wife. Once Thompson arrived at the office, Stockard and another trooper interrogated Thompson for approximately one hour and 16 minutes. During the questioning, Stockard repeatedly informed Thompson that he was not under arrest, that he was free to leave at any time, and that he would he would be able to leave when the questioning ended.

7. During the interrogation, the troopers told Thompson that they believed he had killed his former wife and urged him to help them get at the truth. Stockard told Thompson to tell his side of the story so that they could present that version to the District Attorney. Otherwise, he warned Thompson that the prosecutor might conclude that killing of Dixie Thompson was first-degree murder. Stockard suggested that if Thompson explained his part in the slaying, it was possible that he might only be guilty of a lesser charge such as manslaughter or negligent homicide; and would be facing a minimal sentence such as two to five years, as opposed to a ninety-nine year sentence for first-degree murder.

8. After several lengthy statements by the troopers in which they informed Thompson that they didn't think the killing was first-degree murder, and guaranteed him that they weren't going to arrest him in the office and that he would be permitted to leave, Thompson abandoned his original story and admitted killing his ex-wife. In so doing, he asserted that he initially stabbed her in self defense and then lost control and continued to stab her in the heat of passion.

9. Once the interrogation was concluded, Thompson was permitted to leave the trooper headquarters, as promised. He was arrested approximately two hours later and charged with first degree murder.

10. At no time during the interrogation did the troopers advise Johnson of his *Miranda* rights.

DISCUSSION

This petition raises two questions. First, was Thompson's confession obtained in violation of his 5th Amendment right against self-incrimination? Second, were his

statements involuntary? For the reasons given herein, the answer to both questions should be in the negative.

Thompson was neither in custody nor deprived of his rights in any significant way during the interrogation. He was repeatedly told that he was not under arrest and that he could leave anytime. Trooper Stockard even guaranteed that he would be free to leave at the end of the questioning. In fact, when the questioning was finished and he had admitted killing his wife, he was allowed to go.

The trial judge found that Thompson was not in custody for *Miranda* purposes. The Alaska Court of Appeals affirmed his decision. (*Thompson v. State*, 768 P.2d at 130-31). This finding is presumptively correct. *See* 28 U.S.C. § 2254(d).

The United States Supreme Court has held that a person who is a suspect is not in custody for *Miranda* purposes unless there has been some actual indication of custody that would make a reasonable, innocent person feel that he was not free to break off the questioning and leave. *See Minnesota v. Murphy*, 465 U.S. 420, 431, 104 S.C. 1136, 1144, 79 L.Ed.2d 409 (1984); *California v. Beheler*, 463 U.1S. 1121, 1124, 103 S.Ct. 3517, 3519-20, 77 L.1Ed.2d 1275 (1983). The Supreme Court has adopted an objective, "reasonable man" test for deciding whether a person is in custody or otherwise subject to restraints comparable to those associated with formal arrest. *See Berkemer v. McCarty*, 468 U.S. 420, 441, 442, 104 S.Ct. 3138, 3150, 3151, 82 L.Ed.2d 317 (1984).

In determining whether someone is in custody, the trial court must consider the totality of the circumstances and then decide whether a reasonable person would have believed that he or she was not free to leave. *United States v. Pinion*, 800 F.2d 976, 978-79 (9th Cir. 1986), *cert. denied*, 480 U.S. 936, 107 S.t. 1580, 94 L.Ed.2d 770 (1987). Relevant factors to be considered are: (1)

the language used by the officer to summon the individual; (2) the extent to which the individual is confronted with evidence of his guilt; (3) the physical surroundings of the interview; (4) its duration; and, (5) the degree of pressure applied to detain the individual. *United States v. Wauneka*, 770 F.2d 1434, 1438 (9th Cir. 1985).

Here, there is no indication language was used by trooper Stockard that would imply to Thompson that he should expect to be arrested when he came into the office. During the interrogation, he was confronted with some evidence implying his involvement in his ex-wife's killing (e.g. tire tracks at the scene where the body was found similar if not identical to the tire patterns on his vehicle), although this information did not appear to be sufficient by itself to encourage him to change his story.

The interview took place On September 15, 1986 in the troopers' offices. It began at 10:58 a.m. and ended at 12:14 p.m. Thompson was not physically restrained in any way. Both troopers were dressed in plain clothes. There is no indication that he would have been prevented from leaving if he chose to do so. His vehicle keys were not taken from him until after he confessed, and he was told that his truck was going to be impounded. He was repeatedly told that he was free to leave. He was permitted to leave following the interrogation. The location, by itself, does not indicate Thompson was in custody and required *Miranda* warnings. *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977). Neither does the hour and sixteen minutes involved in the questioning.

Thompson spoke freely with the troopers concerning his relationship with his former wife. He initially offered them a scenario in which he appeared to be innocent of his ex-wife's death. The troopers had focused on him as the principal suspect in her killing, although this, by itself, is insufficient to require *Miranda* warnings. *Minnesota v. Murphy*, 465 U.S. 420, 431, 104 S.Ct. 1136, 1144, 79

L.Ed.2d 409 (1984). They obviously wanted him to implicate himself; and, employed classic interrogation techniques in their successful attempt to secure a confession. Nevertheless, they consistently reminded Thompson that he was free to leave at any time he wanted.

Both the trial judge and the state appellate court carefully considered the totality of circumstances surrounding this issue. They applied an objective, reasonable person test, finding that Thompson was not in custody at the time of his interrogation and, therefore, the troopers were not required to give him his *Miranda* warnings. The record amply supports this finding.

Thompson alleges that his confession was coerced by the troopers' promise to bring his version of the facts to the attention of the district attorney, and their statements implying to him that they believed he might be charged with negligent homicide or manslaughter, rather than first degree murder, if they did. This argument fails because the troopers never directly or indirectly promised that they would do more than bring his story to the prosecutor and search for any facts that would corroborate it. They did not have the charging authority, and they never implied otherwise. Their statements, by themselves, are not sufficient to render Thompson's statements involuntary: "The promise must be sufficiently compelling to overbear the suspect's will in light of all attendant circumstances." *United States v. Leon Guerrero*, 847 F.2d 1363 at 1366 (9th Cir. 1988). The Alaska Court of Appeals, after a careful review of all of the circumstances surrounding the confession, found that the troopers' statements were not the kind of inducements that were likely to overcome his will and bring about a confession that was not voluntary. *Thompson v. State*, 768 P.2d at 131-32. The record supports this finding.

RECOMMENDATION

Based upon the foregoing, it is hereby recommended that this petition be DENIED.

DATED this 29th of December, 1992.

/s/ Harry Branson
HARRY BRANSON
U.S. Magistrate Judge

MINUTES OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. A91-171 CIV.

CARL THOMPSON

v.

JOSEPH CLASS, *et al.*

THE HONORABLE HARRY BRANSON, U.S. Magistrate
Deputy Clerk/Recorder: Ellaine Wheeler

MINUTE ORDER FROM CHAMBERS

This Court has reviewed petitioner's objections to its Initial Report and Recommendation [Docket No. 24]. It has also reviewed the transcript of petitioner's interrogation on September 15, 1985. The Court acknowledges that as a result of a typing error, the name "Johnson" instead of "Thompson" was inserted in Paragraph 10 of the Findings of Fact and would amend this paragraph accordingly. This Court declines to modify the Initial Report and Recommendation further. This matter is now ready to be forwarded to the trial judge for determination.

Deputy Clerk's Initials:*emw*

DATE: September 28, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. A91-171-CIVIL

CARL THOMPSON,
Petitioner,

v.

JOSEPH CLASS, *et al.*,
Defendants.

ORDER

Petitioner, who was convicted of first degree murder and tampering with physical evidence, seeks a writ of habeas corpus challenging his conviction. Petitioner raises two issues: that certain incriminating statements were obtained in violation of his *Miranda* rights; and that the statements were involuntary. Parties dispute whether the petitioner was actually in custody when he made the statements. Petitioner has exhausted his state remedies as to these issues. Petitioner is represented by counsel, who has briefed and argued the matter before Magistrate Judge Branson. Magistrate Judge Branson has made findings of facts, conclusions of law, and recommends that the petition be denied. Neither party objected to Magistrate Judge Branson's recommendations. After a thorough and independent review of the record, I agree with Magistrate Judge Branson's finding of facts, conclusions of law, and recommendation. *See United States v. Remsing*, 874 F.2d 614 (9th Cir. 1989).

IT IS THEREFORE ORDERED THAT:

For the reasons stated in the report and recommendation, this petition is DISMISSED.

DATED the 18th day of February, 1992, at Anchorage, Alaska.

/s/ John W. Sedwick
JOHN W. SEDWICK
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. A91-171-CIV (JWS)

CARL THOMPSON,
Petitioner,

v.

JOSEPH CLASS, *et al.*,
Defendants.

ORDER FROM CHAMBERS

BACKGROUND

On December 29, 1992, Magistrate Judge Branson recommended that Carl Thompson's petition for a writ of *habeas corpus* be denied. Thereafter, following an independent review, this court concluded that the recommendation was correct and denied the petition on February 18, 1993. Petitioner then filed a motion to vacate judgment and to allow a new ten-day period in order to file objections to Magistrate Judge Branson's report and recommendation. This court granted the motion on July 19, 1993. Petitioner then filed timely objections. Following a review of the those objections, Magistrate Judge Branson certified his initial report and recommendation as final.[1] The matter is now referred back to this court for consideration.

---

[1] Magistrate Judge Branson's only revision involved a typing error. In the initial report and recommendation, petitioner Thompson was referred to in one instance as "Johnson."

Petitioner Carl Thompson was convicted of first degree murder and tampering with physical evidence. He raises two issues in his petition: that certain incriminating statements were obtained in violation of his *Miranda* rights; and that the statements were involuntary. Petitioner argues that he was actually in custody when he made the statements. Petitioner has exhausted his state remedies as to these issues.

In his initial and final report and recommendation, Magistrate Judge Branson has made findings of facts, conclusions of law, and recommends that the petition be denied. After a thorough and independent review of the record, with two exceptions to the findings of fact, the court agrees with the Magistrate Judge's recommendation. *See United States v. Remsing*, 874 F.2d 614, 618 (9th Cir. 1989).

DISCUSSION

I. *Was Mr. Thompson In Custody For Miranda Purposes?*

Petitioner objects to the Magistrate Judge's finding of fact that Mr. Thompson's questioning lasted approximately one hour and sixteen minutes. The transcript of Mr. Thompson's questioning reveals that it lasted from 10:58 a.m. until 12:54 p.m. *See* Docket no. 1, Exhibit F. Therefore, as petitioner contends, the questioning lasted for at least one hour and fifty-six minutes.

Petiitoner also objects to the Magistrate Judge's implicit finding of fact that Mr. Thompson's keys were only taken from him after he made his confession. In the evidence before the court, it cannot be conclusively determined when, precisely, Mr. Thompson's keys were taken from him. Nevertheless, the evidence shows that Mr. Thompson was repeatedly informed that he was free to leave at any time. *See* Docket no. 1, Exhibit F, at 27, 49-50, 81, 84-86. Moreover, the Alaska Court of Appeals also found that, at numerous times, Mr. Thompson told he was free to leave. *See* Docket no. 1, Exhibit A, at 8.

The fact that the questioning lasted almost two hours, rather than one and one-quarter hour, however, is insufficient, on its own, to reverse the state courts' determination that Mr. Thompson was not in custody for *Miranda* purposes. Federal courts considering *habeas corpus* petitions give deference to the state court;s factual findings. 28 U.S.C. § 2254(d). The state court's factual determination that Thompson was not in custody is, thus, presumptively correct. *See Marshall v. Lonberger*, 459 U.S. 422, 431-32 (1983); *see also Dres. v. Campoy*, 784 F.2d 996, 998 (9th cir. 1986) (state court findings of fact are presumed correct in *habeas corpus* proceedings). Accordingly, this court agrees with the Magistrate Judge's recommendation that Mr. Thompson's petition should be denied.

IT IS THEREFORE ORDERED THAT:

For the reasons stated above, this petition (Docket no. 1) is DENIED.

DATED the 7th day of December, 1993, at Anchorage, Alaska.

/s/ John W. Sedwick
JOHN W. SEDWICK
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

Case Number: A91-171CIV (JWS)

CARL THOMPSON

v.

JOSEPH CLASS, *et al.*

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT the petitioner's, Carl Thompson, petition for Writ of Habeas Corpus is DENIED.

APPROVED:

/s/ John W. Sedwick
U.S. District Court Judge

Date 8 December '93

/s/ [Illegible]
Clerk
12/9/93

/s/ [Illegible]
(By) Deputy Clerk

MINUTES OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. A91-171 CV (JWS)

CARL THOMPSON

v.

JOSEPH CLASS, *et al.*

THE HONORABLE JOHN W. SEDWICK
Deputy Clerk Pam Richter

ORDER FROM CHAMBERS

Petitioner's motion for a certificate of probable cause is hereby GRANTED.

[Filed Jan. 11, 1994]

DATE: January 11, 1994 INITIALS: *prr*
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C.A. No. 94-35052
D.C. No. CV-91-00171-JWS

CARL THOMPSON,
Petitioner-Appellant,

v.

PATRICK KEOHANE, Warden; CHARLES E. COLE,
Attorney General, State of Alaska,
Respondent-Appellee.

Appeal from the United States District Court
for the District of Alaska

John W. Sedwick, District Judge, Presiding

Argued and Submitted August 5, 1994
Anchorage, Alaska

BEFORE: PREGERSON, CANBY and BOOCHEVER, Circuit Judges

MEMORANDUM *

Carl Thompson appeals the district court's denial of his petition for writ of habeas corpus. Thompson alleges

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

that his incarceration violates the Constitution because the state trial court admitted statements that Thompson argues were obtained in violation of his *Miranda* rights and a confession that he argues was involuntary. We affirm.

I.

We recently have held that a state court's determination that a defendant was not in custody for purposes of *Miranda* is a question of fact entitled to the presumption of correctness under 28 U.S.C. § 2254(d). *Krantz v. Briggs*, 983 F.2d 961, 961-64 (9th Cir. 1993). Thompson has not shown, and it does not otherwise appear, that any of the exceptions to the presumption, *see* 28 U.S.C. § 2254(d)(1)-(8) (1988), apply in this case. Accordingly, we may only disturb the state court's factual determination if it lacks even fair support in the record. *Krantz* at 964.[1]

We have reviewed the entire transcript of Thompson's interrogation. Thompson voluntarily appeared at the trooper headquarters. During the interrogation, the troopers assured him several times that he was free to terminate the interview and leave. Indeed, even after he confessed, Thompson was permitted to leave when the interview was complete. "Fair support" exists for the state court's determination that Thompson was not in custody for *Miranda* purposes. *See id.* at 963 (test for determining custody is whether, based upon a review of all the pertinent facts, a reasonable innocent person in such circumstances would conclude that they were not free to leave).

[1] This standard requires that we "more than simply disagree with the state court." *Krantz*, 983 F.2d at 964. Accordingly, Thompson's attempts to analogize the circumstances of his interrogation to the circumstances of cases in which this court has held that a federal defendant was in custody for purposes of *Miranda* are unavailing.

II.

We review *de novo* the question whether, considering the totality of the circumstances, Thompson's will was overborne through psychological pressure rendering his confession involuntary. *See Miller v. Fenton*, 474 U.S. 104, 110 (1985). We have independently evaluated the transcript of Thompson's interrogation and concluded that, the cumulative effect of those tactics did not overbear Thompson's will.

AFFIRMED.

EXCERPTS OF TRANSCRIPT OF

SEPTEMBER 15, 1986—

STATEMENT OF CARL THOMPSON

PROCEEDINGS

[1] SGT. STOCKTON: The time is time 10:58 a.m. and the date is September 15, 1985 (sic). This is Sergeant Stockard. Carl Thompson has just arrived at AST headquarters and Trooper Hard has gone to the front counter to bring him back to the investigations area. Trooper Hard and Sgt. Stockard will be conducting this interview.

(Long pause—awaiting witness)

(Indiscernible voices off in a distance)

SGT. STOCKARD. (Indiscernible—ongoing conversion as they enter the room). I just don't know what to—what to think here. Let's see this.

MR. HARD: Why don't you sit over here for a minute. Got—got two (indiscernible) here. These, kind of gone over some of this stuff of her. Here, you take a look at that.

MR. THOMPSON: Yeah, the three jewelry boxes all right.

MR. STOCKARD: Is that your—how about this stuff now this stuff now, this is interesting. Okay. How about this, this stuff? (From this point on, A will be Mr. Thompson, Q will be Sgt. Stockton and Q2 Hard when able to distinguish)

A Yeah, sure is.
Q Okay. This—these earrings?
A (indiscernible—interrupted).
Q These I thought they were kind of unusual rings.
A Uh-huh.

* * * *

[4] Q Okay. Okay. Because I don't see anything, real —but it's about the same (indiscernible) as hers?

A Yeah, exactly. It looks like it.

Q When—when would she have gotten that, if you remember?

A I think her mom use to loan it to her, if I remember about a year, oh back last winter sometime.

Q Oh okay. So (indiscernible) her mom (indiscernible—opening packages).

A Yeah.

Q Okay. And how about the jewelry box, when did she get that? You say her mom gave that. . . .

A My mom gave that to her about. . . .

Q Oh your mom.

A I think last Christmas or the Christmas before. I can't remember.

* * * *

[27] Q Uh-huh.

A But I can't remember what kind of shirt she had on.

Q Yeah.

A Hard to say.

Q Okay.

A But she always wore jeans, about all, you know, the only thing. She never wore no slacks or anything like that.

Q Nothing real fancy?

A No.

Q Well, they (indiscernible) you don't have to be fancy to be a good woman, huh?

A No.

Q That beauty is only—only skin deep, it's what's under that counts.

A Right.

Q Do you know—of course, I don't mean to take up a lot of your time, you—you can leave any time that you want to, if you've got something else going on.

A Oh no (indiscernible) around here, no.

Q I know we called you and probably woke you up and. . . .

A No, I was just laying there.

[28] Q Okay. But you know, you can go any time you want to. We got a—you know, we're trying to—trying to crack on this thing, and I—I don't imagine it's any secret to you that there are some of your—your friends or associates who have been kind of calling up and saying, you know, they've been pointing at you. . . .

A Yeah, that (indiscernible) guy you know and we've been friends for ten years, you know, and this guy is starting to say stuff that I never even said. First off he's got. . . .

Q What kind—what kind of stuff is he saying?

A Oh that I told him that I just came home and she was gone.

Q Uh-huh.

A That was the time before, you know. I mean it's obvious I didn't. . . .

Q Okay.

A . . . . come home and she was gone. I mean everybody knows that for Christ sake. God, you know, stuff like that, and he swears up and down I said that. And I said, hey you're crazy, Man. I never said that:

Q Yeah.

A Don't have any reason to say that, for Cripes' sake.

* * * *

[38] Q All right. Well I'll tell you, you know the biggest problem we've got right now to get by is I have to tell you, you guys did a pretty good job out there, and it—it's real obvious exactly what happened, how somebody backed up with tire tracks (indiscernible) and stuff like that. And the wheel—we've got one real good tire cast. I mean there's a couple you kind of figure (indiscernible), but one is a real good one. And I've got to tell you that that tire cast matches the truck—the style tire on your car just right to a T.

A Right.

Q And that—that gives me a real problem here.

A Uh-huh.

Q It gives us a lot of problem. Because I—I've got to tell you I haven't been entirely honest with you. I mean I've been pretty—pretty up front here. If I—I've held some things back from you.

A Uh-huh.

Q And I'm real concerned about this tire track out there. Now how we're gonna explain that? Was it just coincidence that somebody else has the identical tire, which of course the lab will be able to tell if they look at all the little cuts and scrapes and differential wear, all that kind of stuff.

A Uh-huh.

[39] Q They'll be able to do that for us.

A Uh-huh.

Q But I have—I have—I have some problems with this. And I think that maybe (indiscernible) have to be honest, is where at the point where we're not really dealing with the—the how of the thing, we're not really dealing with the who, probably not really with the when or the where; what we're really dealing with is the why. And I think that what we're going to find here is that the big question of why is that it's not—it's to determine whether or not we're dealing with a cold calculating murderer who sat back, planned this thing for days or weeks and finally, let's do it or—or somebody that happened—got out of hand, you know, that—that this foolish bitch brought on herself really. I mean that—you know that she just—just picking and poking and if it's one of the things that just happened (snapping fingers) like that instantly and it's over before it starts and—and here's—she's got you into real trouble this time. I mean not just the usual bullshit trouble she's getting it. . . .

A Uh-huh.

Q . . . . then that's a whole different complexion on —on the other things.

A All right. I know.

Q And you know. . . .

[40] A That wasn't me, there's no way.

Q . . . . frankly I think that there's still some question and I—I think that you did do this thing.

A You really do, huh?

Q I think that right now it's still looking that way. I wish I could find a way to prove that that wasn't so. But I—I'm sure in my own heart right here. I'll tell you why. It's because it's like I—like I told you told. I haven't told you everything. It's like we're playing poker. Are you a good poker player?

A I play yeah.

Q Play a little? Do you win a lot of money?

A Not usually, no.

Q No, huh. Well I'll tell you it's like we're playing poker, you know, and I'm holding a hand here and you're holding a hand here. And I—I've shown you a couple of my cards, but I haven't shown them all to you.

A Uh-huh.

Q And—and right now what you're betting on is you're betting that whatever you're holding there is more than what I'm holding. Now I can assure you that. . . .

A Well I don't look at it like that.

Q Yeah. Between Sam and—and myself and Jim and the first sergeant and all of us here, we've probably got over a 100 years of experience at working on this sort of thing. And [41] we'll get to all the facts and we've already got a tremendous number of them right now.

A Uh-huh.

Q And you know what I'm really—waht I'm getting at here is I'm—I'm giving you now the opportunity to make the best of a bad situation. And I think that she —she brought the situation on, that she got you into what got to be the biggest trouble she's ever gotten you

in before. I mean she got you in trouble before there, when she—she made you lose her temper over taking that money and she—and you punched her around a little bit and then she goes to the troopers later and she's gotten you in trouble other times. I mean I know that the other times when you've done things—I mean you had this thing at Chena Hot Springs.

A Uh-huh.

Q And I've talked to Mike and I've talked to the other people and I've read the report, and it looks to me like every time you punch somebody out, that you do that that you've got a good reason for it. I mean if—am I—am I right? That guy out hot springs is an asshole. I know that. I've been out there myself.

A Yeah. No I. . . .

Q He probably just told youto piss off—piss (indiscernible) up the road, or something, didn't he?

A (Indiscernible) to clean up.

[42] Q1 Yeah and he deserved what he got. Well I —you know what my present attitude he say—he says that Carl has got to be an easy-going guy who doesn't get—doesn't get really upset at things until somebody does something and they deserve it. And then—then you do it. And that's what you said. You said that guy at Chena Hot Springs, if Carl punched him, he'd have had to deserve it. He's have had to—had to do it.

Q2 Well. . . .

A Yeah I mean. . . .

Q And I think that's true. I mean you were talking about what happened to Dixie that time before. I mean she stole $7,000. If that isn't a reason. Somebody deserves to get at least the message brought home I don't know what is.

A Yeah.

Q I mean I'm not gonna leave anybody steal $7,000 from me and get away with it.

A Yeah.

* * * *

[45] Q . . . . who are going to say and think that. Well they're gonna continue to say and think that unless that we can show that that's not what—what really happened. And I'm willing to work with you on this thing to make the best of a bad situation. I can't tell you that this isn't a bad situation. I mean you're free to get up and walk out of here now and—and never talk to me again. But what I'm telling you now is this is probably the last chance we'll have to—for you to say something that other people are gonna believe because let's just—let's just say that there's enough (indiscernible) here already that we can—we can prove conclusively beyond a reasonable doubt that—that you were responsible for this thing—this thing. Well really there's a lot that she's responsible for, but you're the guy that's stuck with the problem. And you get stuck with the mess to clean up, you know. You know, say we can prove that, if we come down you know, six—a month, two months, [46] six months later and now you've come forward and you're trying to tell a sotry, people are gonna say, ah this guy has had time to think of something. This guy is putting this story together. He's making it up now because he knows what the police. . . .

A I've already told you the story.

Q And—and he's making it up. Well you haven't told me the critical part and you haven't told me the part about where Dixie gets killed.

A And I don't know about that. That's your guys' job. You're supposed to know that.

Q Well like I told you, we know the who, the where, the when, the how. The thing we don't know is the why. And that's—that's the thing we've got to kind of get straight here today between you and I. See I know that you did this thing. There's—there's no question in my mind about that. I can see it. I can see it when I'm looking at you. And I know that you care about Dixie. I mean this isn't something that you wanted to happen. You never would have—I mean if you'd wanted for this

to happen to Dixie, would you have let her come back into your life? Would you have gone to Anchorage and got her? Would you—you gone on—you wouldn't. That would have been nonsense. But I know that. . . .

A You're (indiscernible).

[47] Q . . . . that sometimes things happen.

A Well. . . .

Q Sometimes, you know, people get pushed and—and things happen. I don't know—you know, I can't—I can only speculate, you know. I can see the results of what happened. I can see the physical things, right? I can see the physical evidence, I can see what led up to it. Like I say, I got those—the who, the when, the why—or the who, the where, the how, the what, those things. Those are just physical. But they don't get to the heart of the matter, and that's the why. I mean there are times when things get. . . .

A (Indiscernible) don't even know why that—well why don't you arrest me if I did it?

Q I don't want to arrest you. I'm not gonna arrest you today. I think—I told you a dozen times. You're free to walk out of here any time, and you can. But what I'm telling you is that—that I think that now it's the time for you to come honest about this thing, because if you turn around later and try to. . . .

A I am being honest about it.

Q No, you haven't. You told part of the truth and you told a lot of it, but you haven't told all of it. And—and that's the problem. I mean your—you're not probably lying directly to me, but you're lying by omission (indiscernible) [48] on those things. Now like I told you we don't—I haven't told you everything and—and I'm not going to. And even—no matter what you think it's not everything. I can tell you that right now there's a search warrant being served out at the place, 15.1 mile and a search warrant for your truck is gonna be served and we've got a forensic expert up from—from Anchorage and they'll have techniques which you probably aren't familiar with, and I'm not an expert—that's why we got them here—called—a thing called *luminal* (ph) and it's a way that you can pick up microscopic traces of blood ever after it's been washed and cleaned-away. I mean it's an amazing thing, you know, they spray the stuff around, they turn on the black lights and all—all the little droplets of blood and everything light up.

A Huh.

Q And they're doing that stuff right now. And I—and I have no doubt in my—in my heart that's what they're gonna find out there, because I've looked through other things, and—and I've looked at you. And I don't believe that you're a bad person. I really don't. I don't believe that you're—you've got an evil cold-hearted (indiscernible) criminal who decided to do these things. I believe *genuinely* (ph) I mean right here, that what—that what happened here was never planned, what happened here was one of these things that just happen. I mean things happened bad, things happen to [49] even good people. And when it happened you're stuck with this—I mean you're stuck with a hell of a mess now. She's got—she's finally got you into more trouble than she can possibly imagine. I mean she's brought this thing on you. She causes that. She's the one—I mean you're happy. You're out drinking, having a good time. You come back and she's pissed and moaning and saying well I'm gonna pack my shit out andon and on. I don't know what exactly what happened out there. I mean I don't know whether she started the thing by grabbing the knife and saying she was gonna (indiscernible) at you and it got turned around or just what happened. I mean I don't know those things. All—there's only two people who know these things. That's her and that's you. And of course she can't tell us. She can tell us a lot of things, from what's left. I mean she tells us things. She can't—can't tell us the why, but she can tell us all those how and the whens and all those things. And—and that's

what's critical, because we've got those things. And we're getting more of them every moment. And I have no doubt and I know that you know in your heart that all those things are gonna come out because the truth does come out in the end, ...

A Uh-huh.

Q . . . . almost all of it.

Q2 Uh-huh.

Q Now we're at the point right now where two things can [50] happen. Obviously you can just walk right out of here, like you're gonna do. I mean you're gonna walk right out of here today no matter what. No matter what you tell me you'll walk out of here. Okay? I mean there's no question in my mind on that. And I hope there's no question in yours. Is there?

A No.

Q Okay. But the question here is are you gonna end up labelled and stuck with that label that people are gonna want to put on you, that hard-core, that bad image, or—or are you gonna take the time and the courage—because that's what it takes, to come forward and explain why this thing really happened, because I suspect that this thing is not the way some people are gonna say. I mean some people are—Dave is gonna say, yeah, he went out there and he just said he'd had enough and stab her. Period. I mean he probably stuck it in her back. I mean who knows what he's gonna say. He's gonna say—you know he's gonna say that. I mean people are going to say that. No way that people are gonna believe that. Maybe so, but you know, there are people who are gonna believe that stuff. Well you have a—a unique opportunity here and that opportunity is to help us to get at the real truth, not the speculative well maybe this is what happened. We know the physical: this is where it happened and who— [51] who it happend with and that sort of thing, but the why it happened. The exact—I mean because that's what makes a big difference. I mean obviously you know that you're

in trouble right now. There's no question about that, right?

A I'm not in any trouble. I didn't do anything.

Q Well but you did—you killed Dixie. I mean that's —that's what you're in trouble over and you know that. There's no question about that. Now I—I. . . .

A If I killed her how come you never arrested me?

Q Because we don't. . . .

Q2 We don't think you're a cold-blooded killer.

A I want to know why.

Q We don't think—if you were a cold-blooded killer, a contract killer and somebody who plots these things out, well then we'd have to move fast, wouldn't we, because you might do it again. I mean you could do it any time, right? I mean that makes sense, right? If you were a you were a professional killer, somebody who went totally "AWOL," who didn't care about anything. Well we don't think that's the case. I certainly don't. I think what you are is just somebody—an ordinary guy who made a simple mistake, not because you wanted to, but because you were forced in it, you were backed in that corner and the thing just happened and you're stuck with the results. Like somebody who runs through a red light, runs [52] into your car; you're stuck with the result of what's somebody else does. Well I think that's what happened. And because of that yeah, I mean if that's true, you're not gonna go out and kill somebody else. I mean there's no danger to anybody else, so why should I arrest you? I mean I should give you—it's what we're here for right now—the opportunity to explain —to put your best face forward, put your best foot forward, to explain exactly what happened, rather than later on having to get back there and trying to you know, shuffle and try to make things make sense and saying no, no, no. Wait you misunderstood that. That's not exactly the way it happened; this is what happened. I mean I don't want you to get in a point of trying to explain things when other people have already made up their

mind. I'm giving you the opportunity to help us to come to the real truth of this thing. Because I—I know that you did this thing. You know, there's—there's other evidence which like I say I haven't told you about. You know, we've got things, we've got—got the knife that came from the same place as the rest of the stuff. And it's been sent off to Anchorage to the forensic people and they're gonna do blood analysis, finger printing, *laser* (ph), the latest stuff, all the stuff that they do. And I don't know if your—if your fingerprints are gonna be on that knife. I don't know that. Is—is traces of your blood gonna be on [53] there mixed with hers? I don't know those things. But I do know is that all these things, all these (indiscernible) all these little teeny bit pieces of the puzzle are come—you know, are coming together. And all those out, they're all pointing at you. And all the bits of the puzzle are fitting in the grand picture here. Now there's only one part of that picture which only you can supply is the part that says why, intentions. What was in that (indiscernible)? I mean if you set out, intended to kill and you aren't sorry about it and you don't give a damn, then fine. I mean I wash my hands of you. I don't care what they do to you, because I mean that's probably what you deserve, right. I don't think that you're that kind of person. I think that there's—there's good in you, that there's—that there's something bad that happened to you. But that—that you didn't set out and intend for this to happen. You didn't intend for Dixie to die. You didn't even intend to hurt her. It's just like the other times she did things that were so outrageous—and I don't know what that outrageous thing was, but it was worse than stealing $7,000. It was worse than all the other things she'd ever done together and it was so bad and for all that you just did—in a blink of an eye something happened. And I don't think whether she started it and it just happened to get finished the way it did, that you finished what she started or what happened. I mean I— [54] I don't know those things.

A Uh-huh.

Q Because those are the why. That's—that's what's here.

A Does that make any difference?

Q That's the human element. Sure as hell does.

Q2 Sure.

Q Think—think of the difference here, what—we have a just system which has a problem. We've got little cubbyholes where people—when people who are human and who are different and unique, and have to fit in. And what they do when somebody does something we have to take their act, what they were thinking and what they did and fit it into one of these cubbyholes. Now one of those cubbyholes, of course, is first degree murder, right? That's—that's an unclassified felony, deserve a 99 years, presumptive sentence of 20 years, all that kind of stuff. Well then there's another cubbyhole that's called second degree murder, And that's—I don't remember. It's like an A felony and it's 20 years or—or—maybe that's nin—up to 99 but presumptive is 5, I think that's what it is. Then there's—there's negligent homicide, there's manslaughter. There's all these little cubbyholes, right? Well I'd be the first to admit that trying to fit human actions and human things that happen into cubbyholes isn't always easy. You know, because there's—there's an infinite range [55] of what people do and what happens, but there's only a finite range of cubbyholes to fit people in. But that's what—that's where we are and that's where the DA and the grand jury is going to be on this thing to try and pick the right cubbyhole. And I'll—I—I'll—I have to feel that whatever happened to Dixie, if she's partially responsible for it, you shouldn't take all of the blame for it. Right? I mean that makes sense, right? I have to believe that if you're partially responsible for it, you should take some. You know, we all have responsibilities as adult human beings. We have a responsibility to take our licks when they're coming to us, right, even if they're aren't fun. Would you agree with that? I mean when you

do something wrong, to everything we do there's a cost associated with it.

A Yeah, if I did something wrong, sure.

Q That's right. And that's—that's what we're looking at here. We're looking at making sure that you don't get more than you deserve here. I mean I—if you didn't commit a first-degree murder, if you didn't set up and preplan this thing, why should you be charged with that, why should you go to jail for that? If you didn't commit a second-degree murder, I don't want you to be charged for that. If all that happened here is a manslaughter or a negligent ham—homicide, something which—which where [56] she starts it an she's coming at you and you defend yourself or whatever it is, I don't know. I—I don't know that. That's the thing I don't know. Then I want to see that justice is done here, that—that are you subject to an injustice. Now there are going to be those people—there are going to be the DAs and all those people who are going to look at—they're going to look at the old—the other case, the allegations she's made, and they'll look at the man at Chena Hot Springs—they're gonna look at, you know, other times when you had fights or been (indiscernible) This guy is a bad guy, God. I mean that's gonna be their—their first idea, gosh, think gosh, what a terrible guy. Right? Well I—I've looked at those and I've looked at it carefully you know I have because—because I—I can tell you things about it. . . .

A Uh-huh.

Q . . . . each one of those times there was a reason that you did what you did. You didn't do these things just out of space. I mean you didn't just suddenly decide something for no reason or you're not crazy. You're not a psychopath or something like that. You're just an ordinary guy who when he gets pushed, when he gets backed into a corner, when he's subject to an injustice, when somebody does something to you which they shouldn't have done, that you react. I mean it just hap—

it [57] just so happens that the way sometimes you react is by hitting somebody or by pushing them or by slapping them around. And that's not necessarily bad. I mean obviously some people need that. And I'm not worried about those things. I mean I—I don't—I don't care. Those things aren't important, because right now what we've done is she's got you in a hell of a bind. I mean she brought this thing on, she left you there, stuck with this body and the problem of how—how—how the hell do I—how to explain this. I mean what do you do? You've got to sit there and say well gosh, you know, I got this body here. If I just—if I just call the cops and say—and try to explain this nobody is going to believe me. They're gonna say, ah bullshit. You know, we've got your past record. We've got the complaints you made in the past, you must've just decided that you had enough of this and killed her. I mean you got to be thinking tht when you're sitting there with her lying there. So you did the thing which you felt you had to do. And that was just to get rid of it and just wash your hands, just forget. She brought this thing on. It's her fault. Why should you be forced to live with that. I mean forced to live with what happened. I mean I know that you can never forget that night, no matter what happened that night. That night is burned into your mind. But what I want to do is I want to give you a chance to—[58] to show that you're sorry. I means I assume that you're sorry that Dixie's dead.

A Yeah.

Q Yeah. She was your wife, you loved her and even after she wasn't your wife, even after she filed divorce papers and all that stuff and gone all the way through with it, she—you were still letting her come back with you because you love her that much. You can tell that she's the one—she's the one who's flying off here, flying off there, just taking off, just taking off not telling you when she's gonna come. And yet you loved her so much that every time you let her come back. And that's where

—that's where we're at. You know, we're at that place where it's time to be really honest about this thing, because I think, I believe here that just in this case, just as in all of those times that whatever happened, the exact details of what happened, you had a reason for. I mean you didn't—you just didn't do this thing just on the spur of the moment, you did do it because you had a reason, because it happened so fast that you weren't able to think through the whole result. I mean you weren't able to go through the whole thing you know, if I do X, Y and Z are gonna happen. I mean you just—it happened so fast—if that's what happened, then that's pro—that's not first degree murder. That's not—I mean are we talking about heat of passion here and are [59] we talking self-defense, these are the questions which are so important for us to get to now. Because later on and that's—right now is the first time anybody sat down and confronted you with things have said these are the things. So if tell us the truth now, the chances are people are much more likely to believe them to be the truth, because they're not gonna say ah, here's the guy who's heard the evidence and now he went away, he thought about it for a few weeks and then he came back and now he's got a story. Right? It's kind of a like if—it's called reasoned evidence, it's the best evidence.

A I don't know how you guys work or—you know what your angles are and anything, but it's not what happened.

Q Well only you and Dixie Can—can tell exactly what happened.

A You guys (indiscernible).

Q Dixie is *not* (ph) telling us. No you can. Because you're the guy who killed her. There's no question about that.

Q2 Carl, we don't. . . .

Q But you. . . .

Q2 We don't—we don't—we do'n—we don't bluff and we don't play little games. You've seen the stuff we

had. I mean I haven't shown you everything we have. I can't do that in the first place. But from what I've shown you, you can just imagine all the rset of the things. . . .

[60] A You don't think somebody could have set me up for this?

Q No. There's no way, Carl. That's just not the way it happened. We know our job and we do it well. Okay.

Q2 Carl, we don't believe you're a cold-blooded killer. We look at your past.

Q I know you're not.

Q2 You loved her. You spent five years of her life with her. But you were drinking that night, things weren't going well, she was mad at you, you got mad, maybe. I don't know. We're asking you to tell us because we don't have that answer.

Q And we don't have—I can't tell you we have every answer, because only you have that—really the human part of it, that part which I think really makes such a difference. Because if you were just a cold—cold-blooded absolutely * AWOL person who wouldn't care, who didn't love, couldn't love, who just used people and threw them away, well then—then you could be treated that way, right? I mean there's—then nobody would have any use for you. But I don't happen to believe that's the case, because I have—you know, I've looked at these—all the other things that you've been involved in and talked to your friends. If they said, Yeah Carl is just crazy. He goes in bars and punches people out for no reason. They didn't say that. Everybody said and all the stuff we have, says that every time that he [60] ever got into a problem that Dixie got you into a problem and really, she's the one who's causing most of these problems. She's there. You had a reason. And you had a reason which is understandable, which is explainable, which makes

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* (or amoral)

sense. Now it may be hard for you to explain the reason why this thing happened. It can't be easy to talk about. I'm no fool. I mean I've been doing this long enough to know that—that this is the hardest thing you'll ever do, is to talk about really happened that night. And there's no question in my mind about that, Carl. The problem here right now is that only you right now can provide that human factor, those things that led up to it, things that you did which is so bad, so outrageous, so just beyond anything that you've ever done before that things got out of hand. And I don't—I don't think this went on for hours or days. I mean I know it didn't. This thing happened—I—just in the blink of an eye, just like the—the other—you know, the other things that happened, like the guy at Chena Hot Springs. You go to him with a disagreement and say hey listen, I got hair in my food, I've got a shitty room, I—I got these problems. What are you gonna do abut it. And he says (indiscernable) and in that flash of an eye the thing is over. Well, I don't know, because you haven't told me and Dixie can't tell me. But I suspect that that's exactly what happened here, is that for some reason [61] she came up with something so outrageous, so unbelievable to you, so—so far out of your (indiscernable) so unfair to you, that just in a flash you reacted. And I don't know, you know, maybe—maybe you slapped her and—and she grabbed for a knife and—and you grabbed it way from her because she was trying to hurt you in self-defense. I don't know those things. So I can't—I wasn't there. And the two people who were there, only one of them is here to tell us. And that's you. And I —I'm asking you now to be honest about this thing, because right now is the best chance you have to be honest now is the time when people are gonna believe you. Because right now everybody is working on this case the task force is working on it and one of the first things we're gonna do if you're truthful with me, and you're honest and you tell me exactly what happened our

big push is not going to be now to prove that you were responsible for the death, it's going to prove that the circumstances were exactly as you described them. Now if you tell me, yeah this is the reason why this happened, this is the explanation why it happened, we're gonna shift our focus from merely trying to—to prove all those who, what, where and when things to proving those why things. Those things are hard to prove but we're willing to work with you on them, I'm willing to work with you, because I don't want to see a second injustice [62] committed. I don't want to see you unjustly and wrongly blamed for things you didn't do or have to pay for things that you didn't do. Okay, I can't tell you that you're that you're gonna—that you—today you're gonna walk out of here. But I can't tell you that this thing is all over when you walk out, you know it's not. You know that there are enough things now that are there that are working on you. We've got the tire, got the knife, we got the jewelry and the clothing, got all those things, we've been working at the airport. You know, we know the things that you've been doing, we've talked to witnesses who—you know your truck right. It's a neat truck I've seen it around town before, it recognizable. We'll remember that truck, beautiful, big, yellow thing, with great big tires on it, I mean it's a neat truck. People remember that. It stands out to 'em.

A Uh-huh.

Q Don't think we haven't been doing our work, because we have.

A I'm sure.

Q I—I want to be able to change the focus to proving Carl's goodness, to proving that the way that Carl says this thing happened is the way it really happened, not to just proving that Carl is responsible. I want to be able to get away from that. We can prove that. That's not going to be a big problem. You know that. I mean I haven't [63] shown you all the cards. I'm still hold—we're playing with seven cards at least. I've only shown

you about three of them. I've still got more in here. I'm not gonna show them to you and you know, you can bet against them if you want but you know how it is. The odds are always with the house and right now I'm dealing. The situation is we can—people can assume as the DA will want to—I mean I know Harry. I mean (indiscernible) Harry Davis in the paper. He's been our DA for years. Harry is gonna assume the worst. He's gonna assume hey, let's—let's get this guy. This guy is bad. Let's get him. Right? Well if he wants to do that, that's fine. I can't stop him unless I have other information to show him that that's not the way it happened. That yeah, you were there, you did do that but there was a reason for it, and a good reason, one that other people could understand, one that's explanable. And I'm sure there is. I mean I don't—like I told you I don't know why exactly is—I don't know what the words were. I don't know what the thing that she said was that was so bad that this thing went to—went to pieces. I don't know what that is. Only you know that. Now only you can—can help yourself at this point by coming forward with those things and explaining exactly what did happen. You know and I know that this is a—the hardest thng you'll ever do. There's no question about it. [64] I mean if you think it was hard getting rid of her and doing all that stuff and getting rid of her clothes and taking them out and throwing them away and stuff, that's nothing compared to the courage it takes to confront me and to talk to me. I mean there's no question about that. You know, I—I can't blame you for being *slow* (ph) about the thing and for wanting to think about it. But unfortunately we've got like a limited reasonable opportunity here, The things—the thing is going down now. This—this is it. I mean this is—this is the time we're giving you an opportunity to—to deal with this thing. And I I know you're going to do the right thing. I mean I know that when the thing happened originally when Dixie got killed, it wasn't because

you planned it, it wasn't because you wanted it to happen, you loved her. That—that—that's the central issue. You loved her. Because of that whatever happened out there happened not because you wanted it to, not because you set out to have it happen, but because she brought it on. She had to do something so outrageous, I mean she stole $7,000 before and you didn't kill her then. I mean you slapped her around a little bit, right? So it had to be something worse than that. Now I don't know whether she said yeah, I've been sleeping around town on you this whole time or yeah I don't—I don't know what that us. Only you can tell us that [65] right now. And if you tell us those things I can promise you, I can give you my solemn word that I'm going to do everything I can to prove that the way you told it to me was the way it really happened. And I'm asking for a chance to do that because I don't want to see an injustice be brought down on you. You know, you may think that sounds a little foolish and a little altruistic. But that's the way I am. I'm in this job because I—I believe in it. I believe that—that if I'm doing this job, then I know it's gonna be done right. It's not going to be some t.v. cop on there that's out for glory and just out to get people. I am not in it for that. I'm in this job because I want to see—(indiscernible) I want to see you—that—that my place in this world is a safe place to live. And that when bad things happen like happened in this case, when bad things happen that we can maybe prevent them from happening in the future to somebody else by knowing why they happened this time. Maybe there's something that somebody could have done to stop this thing from happening. And I don't know. I—I hope there was. And I—you'll never—you know, you'll never get over that. I know that. It's a thing you've got to carry for ever and ever. But I want to prevent this from happening to anybody else. And that's one of the reasons that it's so important to me right here today to find out the truth about what really happened. I mean I—

[66] I have no question that all the forensic analysts all the experts in these things, they're gonna prove all those whys. You know, they don't prove those hows and whats and wheres, they're gonna prove that yeah, it happened and that Carl was there and Carl is responsible and Carl did this thing. But they'll never will prove without your help to look for those other things, the human factors. You and we can do—we're great at some things. You know, we're so good at those forensic things you wouldn't believe it. I'm constantly amazed by what these lab guys do. We've got neutron activation analysis, we've got this luminal stuff, I mean it's like magic to me. I went to—I went to a thing once they did, somebody had been—been—been shot and there had been a pool of blood on the floor and they had washed the floor. They'd cleaned the blood up and they took fluid out and they spray it, like a little spray of liquid. They sprayed it on there. He turned off the lights, they put on this fluorescent light and they had the shape of the pool of blood right on the floor. I'm just a—I'm just a cop. I'm no genius. I'm—I'm—but these guys are wizards. And I'll tell you, the wizards are working now. They're doing their magic. And—and I know from past experience that what there is there to find, they're gonna find. There's just no question about that. What there is already that's been found, it's just—I mean (indiscernible) these things are just—they just—they just point to you. I'm—I [67] don't want to tell you I'm begging with you, but I guess I'm imploring you, I'm encouraging. I'm saying this—this is the time. This is really getting down to the real *nut* (ph) cut. This is where it take the real card, to step forward and saying yeah you're right. I was there. I did this thing and yeah, I got rid of her body and this is why it happened. It didn't happen because I wanted to kill her, it didn't happen because I planned to kill her, it happened because she did this and it got out of hand. Only you can fill in that gap though, because only two people who knew those things—there's

Dixie and she can't tell us. And if you're not—I'll bet that if there was something you could do and that you could have done that night to bring her back from the dead and to cause her to rise up again and live, you would have done it, no matter what, because you loved that woman. You loved Dixie. You didn't want to see her die. But it happened and you've been stuck with it. That's her final revenge, that's the final time that she screws you. She left you stuck with this fallacious mess that she brought on. And I'm asking you to do that hard thing. I think you've got the courage to step forward and explain what really happened. I really do, otherwise I wouldn't waste my time on you. You know, I—I could be out there with these forensic guys doing their thing. But frankly, you know, the thing that I worry more about [68] in these cases is (indiscernible). That's my specialty. You know, I could do the forensic stuff but I—I don't want to. What I want to do, I want to find out why this thing happened. I want to make sure it doesn't happen again. I want to—I want to know the truth about it. And only you can do that. Now I think that whatever happened out there, that I can be sure that you loved Dixie and that you didn't want this thing to happen. And . . . .

A I didn't want whatever happened to happen.

Q Well you did it. There's no question that you killed Dixie. Let's get passed that. I mean that's—we've got to get past this hurdle here. You know, I'm sure that you're sorry for what you did out there. I'm sure of that. Are you sorry that you killed Dixie?

A I didn't kill her.

Q But you did. That's the problem here, Carl. Now I—I thought that you—you were courageous enough and had enough courage to deal with this thing. But I'm beginning to—to reconsider that. From what everybody told me I thought you were the kind of person that was going to do the right thing, who was going to be honest

about this thing and to do the thing that's for your best interest.

Q2 We all make mistakes.

Q Right now. But ain't that the truth. If I could go back and take back some of the things I've done. I'd do it in [69] a flash. But unfortunately life isn't like that. But if we make that—you know, if we do something and it's done, we say a word and we can't pull it back. I don't know what it was that you did that night that was so bad that this thing happened. And I don't think that—that she's—you know, I—you could imagine it in a couple of different ways this thing. You could have said, okay the two of you are standing there and she said something and you grabbed a knife and kill her. I don't believe that, because that—that just doesn't make sense. What makes sense to me is that something happened, she said something, she does something and it starts out like it has in the past, starts out with a little slapping around or something, because you just something to her already, I mean you hit (indiscernible), "Don't say that to me." I mean I don't know, something like that and then she fights back and then she grabs the knife and—and it's—the donnybrook is on. At that point you're not thinking as a human being, you're not thinking, gees, I'm gonna do X, I'm gonna do Y. You're reacting. You're—it's happening so fast that your animal instincts or the parts of you that believe in survival, believe in life that when you're threatened you respond, take it. And if that's what happened, if that's the way it went down, then we need to know that, because that's not that first degree murder. That's not premeditated. [70] I mean that's not gees, I'm planning to do this for months or days, I'm getting paid to do this, I expect to get something. You didn't expect to get anything out of this. Jesus, I mean you stood to lose everything. Right? You're not—you're not doing this for gain, you're not doing this for hate, whatever happened because you love her. Because love and hate

are so close together, anger and love is so close it can flip from one to another. You can be so much in love with somebody that when they say something that hurts her, and they may not even know how bad it hurts you, but it's like a knife in you and it causes an anger, I mean it causes that love just to flip (indiscernible) on anger. And it goes back and forth. And it can. And I know that. I mean I recognize that. And I can put that into words and explain it to other people so that they understand it, so that the DA understands it, so the court understands it, everybody who's going to deal with this thing, can understand what really happened. But before I can do that I can't do it on speculation, I can't speculate to those people that this is what I think might have happened, because there's three or four mights have happened. What I need is, is I need your help on this thing to make sure that the truth is—comes out. That you only get blamed for what you do. That she takes whatever portion of the responsibility she deserves. If she brought this thing on, [71] if it was self-defense on your part, then I need to know that, because quite—quite frankly, if that's the way it went down, that's something like what happened, then that's a whole lot different from if she's got her back turned and you just say well the hell with her, I'm—I'm tired of this bitch, I'm gonna kill her. Well that didn't happen. I mean that's—that's just something that's just not true. That's not—I mean that's just—that's not you, you know. Because there are people like you, lots of them, hundreds of them—myself included—that have a temper. I mean their own—there's people in this office who'll tell you that—that they—they get to me and the only people who get to me—the public doesn't get to me, somebody can come off the street and call me anything they want, that's not gonna bother me. But if somebody close to me, like if Joel here, if Joel came to me and said something really hurtful to me, that would hurt me. I—I might lose my temper on that and I might shout at him

or I might slam (indiscernible) or I might throw the telephone off on the floor, because I have that kind of a temper. But only people who are really close to us have that kind of power over us. And that's what happened here. I mean Dixie is the woman you love, she's the woman you gave five years of your life to. And even though—even though she's wronged you before, she's taken off, she's stolen [72] from you. it'll never come back. I mean you loved her, you know, more than any of us can ever understand really I think. Because you let her come back if she did all these things. No matter what she did to you you were willing to give her another chance, just to—just to have the lady back. And you didn't—you didn't set out to do this thing, it just happened. But whatever she said, whatever she did was that —was that thing that was so personal that hurt you so bad that you just—it just happened fast. I mean it (snaps fingers) like that. And I—I gotta believe that because I think that there's worth in every person and there's worth in you. Because this bad thing happened to you doesn't mean that you should just be thrown away, doesn't mean that you shouldn't have any self-respect, doesn't mean that I shouldn't (indiscernible) up to you. You're still a human being. You're still a person. You've got warmth, you've got desire, you've got the rest of your life which you deserve to be able to lead. Now I'm not saying that—that you'll never pay any penalty for what happened. I can't tell you that. I'd be a fool to. You wouldn't believe it if I did tell you. But what we're talking about here is we're talking about the difference between throwing the rest of your life because you don't have the courage to step forward or being honest about it.

A It wouldn't make any difference if I did.

[73] Q And stand—yeah it would; it'd make a hell of a difference. It'd make a hell of a difference.

A Well you just—just told me, you're not the DA.

Q Because we would. . . .

A You can't be the one who decides what. . . .

Q Yeah, but what we're doing here is I'm the guy who has to go to the DA and tell him, hey this is what he said and we've gone on, we've proven this by the forensic evidence, we've proven that he said that it happened X, Y and Z and that's what happened. The difference is—is everything. The difference is between throwing away the rest of your life. I mean if the DA just decides in his own mind because we don't have anything, that if Carl won't talk, that must mean he was that cold-blooded murderer. He's hiding something. He's hiding it because it was worst than what I think it was. Then he (indiscernible) puts you away and you could be—I mean it could be everything, it could be life.

A Really.

Q Ninety-nine years, that's all—that's life.

Q2 Right.

Q If it's not that. I mean it could be—I mean we're looking at negligent homicide and manslaughter I mean we're talking two years, three years, five years, a fair amount. You know, you get out on—free on parole. [74] We're not talking about the rest of your life. We're talking about just a little period of—and then you go on. But the trouble is, right now is the time when we've got to make the decision of which way we're heading on this thing. I mean if that's what happened, if you deserve only a little bit, I mean if you deserve to go to jail for your entire life because you planned this thing, then I guess my sense of honor would say that that's what you ought to do. Right? But if you didn't, if that's not what happened, then it is important, because right now it makes all the difference in the world. It makes a difference between are we talking that first degree, cold, calculating, actually ammoral psychopathic person, or are we talk. . . .

A You guys already know it wasn't that kind of murder anyway.

Q But I can't prove it. I—I suspect it's not. I don't think it was, but only can tell us exactly what happened.

Only you can make it apparent. I mean we—I can speculate that there must have been something that happened that she said or did that—that started this thing off. I mean I can speculate on that. But I don't know you well enough, I don't know her well enough; I can't ask her the question to know what the bad thing was. But if you can share that with us, if you can make us understand, if you can make me understand why whatever it was is so bad, because I can explain that, I can make other people explain [75] it. I mean I—you're not the kind of guy who writes long books and—and who's real wordy, says a lot of things, and puts things into fancy words so that guys like that DA and judges and people can understand. You're just an ordinary guy like most of us, right? Well one of the things I'm trained to do, the thing that I do is I write and I'm able to put into words so that they'll understand, to convince them if you can convince me that it didn't happen, a cold, calculating killing, you know, I will go to the max for you to prove that the way you say it happened is what happened. But I have to have your trust. And I—I know that's—that's a hell of a thing to ask of a guy, because you've watched t.v. and seen all this stuff. Remember, t.v. is not real. It's—you know, we've got to flush all that stuff out of our mind and try to remember that right now we're talking really about your whole life. Now there's nothing we can do to bring Dixie back—that anybody can. You feel the loss, you—you've lost a woman who you love, her family is feeling the loss of course, but all those things we can get over. I mean eventually you'll get over it. Dixie is not suffering any more. And whatever happened to her, she's not in pain; that's over. All right. So what we're dealing with now is we're dealing with what's left over. And that's you. And you're the lose end, you're the person who has to live with [76] this thing for your entire life. You're the person who has to make the decision now whether or not to just take your chances and hope—

hope like hell that the conclusion that the DA and people come up with was that this wasn't first—you know, first degree murder, a cold, calculated thing. Or the alternative, if you can be honest about this ting, and finally explain that's what happened, to make us understand the why, in what way Dixie was responsible, in what way she caused this thing to happen, because I—everything you've done in the past. . . .

A Well you can't punish Dixie. I mean you know. . . .

Q No, but there's no reason why you should be punished for what she did, right? I mean she can't be punished. You're right, but is there any reason why if she did something wrong, if she's responsible for this thing, that Carl should pay a terrible penalty for what she did? I don't think so. I mean I—I don't know the circumstances. I think—I think that there are—there are things going on and there are explanations which you can make which are going to make a tremendous difference. They make the difference between being that cold, calculating killer who—who people just won't have any feelings for, you know, they say we ought to have a death penalty for, to the—to the other situation, the situation where it's just a fight that gets terribly out of hand. [77] The things that go bad and that things that—things—you know, A led to B, and B led to C and—and before anybody knew it, before anybody had time to think about it, it was over. And if that's the way it happened—I suspect it is because I've looked at your past. And I suspect that's what happened. I don't know that. I don't know that until you're honest with me and you come forward and tell me exactly how it happened, so that you can explain it, so we can understand it, so we can make the best deal for you. I mean that's really why we're giving you the opportunity to do that. You can look at it—you can look at it that way. It's just like we're playing "Let's Make a Deal." We're here right now, we're willing to listen to you right now. We will

give you the benefit of the doubt. Because whatever you tell us right now I have no reason to (indiscernible), okay? And what I'll do is I can assure you that I will do everything that's in my power to find this evidence, to the other people we'll talk to to prove that whatever you tell me, however it really happened is truly believable. I will do that for you. I can—I can actually guarantee you that. But only you can tell us the exact why this thing happened. And that's—that's what we're here for. We're passed the how, passed the where, we're passed the what, the when, we're out on the how. And that's the hardest part because [78] that's motive, not really motive. It's the intention, it's beyond motive. It's—it's what happened in that very instant. I—I had a car wreck once. I was going to a burglary, police car, red lights and siren, right in the middle of the night and all of a sudden I had a tire blow out. And first I ended up in this ditch and (indiscernible) and then I'm across the road. I take out sixty feet of guardrail, flip over the guardrail, and end up about half way into the Tanana River. Right? That thing was so intense that I—I have pictures in my mind—not like a movie, but individual stills and I—I can say there's that sign I'm about to hit, there's that guardrail I'm about to hit, there's the car going upside down over the guardrail, there I am down at the bottom of the hill. It's so intense, it's burned into my memory. But I know exactly what happened, I know what was going through my mind then. I can remember it. And that's why this is so important, because I know —several years ago, I know that what happened to Dixie is burned into your mind, that you remember exactly what happened, and that you can explain to me as hard as it may be what happened, how it happened and what led up to it, what she did that was so bad to bring this thing. Because there's—it's her fault. When you get right down to it, I—I think that probably you'll be able to convince me that what happened was entirely [79] her fault, that you were—you were doing what you thought was

right. Gee, you get—you'd been out drinking. That's no big deal. I mean sure, (indiscernible) gone a couple of hours, you're out drinking you come back, she says, I'm leaving, take me—take me over to the place, I want to get my stuff. What did you do? Took her out to the place. You're going along with her. I mean you love her enough that you're going along with this thing. She says, yeah I'm gonna back up my stuff and and—and something goes bad. And I don't know what it is. While you're out there with her, she continues poking at you, whether she's—and I don't know what that thing is. what's the thing that started this fight and how that fight progressed and it got worse and this thing happened. I—I believe in my heart that you're sorry that you killed Dixie, that you didn't want to do it that way. I mean I know you are. I just have to believe this. Because to believe otherwise is to believe that you did the cold calculating killing, that you don't care about anybody. And I know that's not true because you cared about Dixie, more than anybody else in your life.

Q2 We know that.

Q And that she brought this thing on. And it's her fault if whatever happened out there, she started that, I really believe that. Or maybe you started a little fight and she's [80] the one who escalated it with you on things. Because there are no—you know, nobody that I talked to says, yeah, Carl (indiscernible) picks fights, Carl starts fights. People say well no, Carl kicks back until somebody wrongs him and then he takes action. He's a man of action. And in this case you're a man of action. You're—you're a hunter. You work in the woods, you're a miner. You're a person of action. You're a physical person. And when this thing happened, whatever happened happened so fast that there was a threat to you that was so serious that you responded to it, that you did instinctively what you defined for you to do. It wasn't something that you thought through and said, yeah let's see, about 9:00 o'clock tonight I think I'm

gonna kill Dixie. You didn't do that, I don't believe. Maybe you did. If you did do that I think you'd better not tell me. Okay? If that's what happened, I think you're doing the right thing, you'd better not talk about it. But I don't think the chances are that that's the way it went down is right, because that's not the way you've been in the past. Okay.

Q2 You've got to believe we're here to help you. You've got to believe that. It may not look like it.

Q It's—it's hard.

Q2 But you've got to believe that.

Q That's a hard jump to make, isn't it, because you've got to [81] to trust us and that's—that's a hard thing, saying, gees here I am with a cop and I've got to trust him, I've got to tell him about this terrible thing. But I can promise you as I've promised you before, no matter what we talk about today you'll walk out of here. You'll walk out of here just the same way you came in. (Indiscernible). No matter what. I guarantee you that. Absolute. positively.

A No matter what you aint gonna arrest me?

Q No matter what.

A What I tell you, you aint gonna arrest me.

Q That's right, absolutely. Because we don't believe you're a cold-blooded killer. If you—if I thought you were that cold-blooded killer, well maybe I would feel differently about that, but I'm not gonna arrest you no matter what, I pormise you that. And that's an absolute promise.

A Why wouldn't you?

Q Why should I? You're—Ycu're not—Dixie is dead.

Q2 You're not gonna do it again.

Q You're the per—Dixie was the person that you loved enough that she could hurt you enough to bring this thing on. And she's probably the only person that you cared about enough to get to you that way. Because I have to, because I think that you're basically a good person and the circumstances which brought this thing

about are never gonna happen again I hope. I mean you certainly aren't [82] gonna to let yourself get into a position like that again. And I told you and I'm ask—I'm. . . .

A It was *a real big* (ph) mistake, that's all.

Q There's no question—well that's—that's the way to look at it, then actually you might say it's an accident, in a way, an accident because it's not what anybody intended. You didn't get into this row intending to kill her, you didn't do whatever happened intending to kill her. If you could have waved your hand over her, you would have done it and brought her back. But you couldn't do those things.

Q2 We can't ever bring her back. But maybe we can let her rest a little bit easier to know that the truth came out. And let you rest a little easier because you loved her so much. We know it's not easy. Goddam, it could never be easy. We're asking you to help yourself, and to help Dixie by telling us the truth. Tell us the why, what happened that was so bad that night, something was terrible that night.

Q You're—you're the kind of person who didn't care. If you didn't—if you didn't care about Dixie and you didn't love her then this thing wouldn't bother you, wouldn't eat at you, you'd just go—forget about it and never think about it again, but that's not the kind of person you are. That's one of the reasons why you're not staying out there now. Because to be there brings back the memories, but you [83] can ever wipe those things out.

Q2 It aint gonna be easy, Buddy but it's the right thing to do.

Q And right now it's the thing you can do to help yourself. I mean you know, I'm not trying to sell you a bill of goods here. I'm giving you an opportunity which I don't see how it'll ever come again because from my experience that this—this is the best opportunity. This is the time when people will believe you, because

you haven't had time to—to go away and concoct some story to make you look good. The thing that you'll tell us today, the thing that you're gonna be able to convince us, is the truth of what really happened. Because I have a—I think I have a real (indiscernible) in this business. And it's founded on two things, one, on the "kiss" principle, "Keep it simple, Stupid." When things happen, they're not complicated, they're not like t.v., they're not —you know, wild and crazy and strange people come—coming out, a hit man and that kind of stuff, they're simple. They're understandable. And the other thing is that when you hear it, when you hear truth, when you figure out exactly what really happened, you know it when you hear it, it has that ring of truth. It's like a bell that rings (indiscernible). Everything falls into place. It makes sense with Dixie's personality. It makes sense with Carl's personality. It makes sense with the physical evidence [84] and the things we've seen. And I—I believe that you're gonna tell us that. You know, I believe that you're gonna be honest with us and explain to us exactly what really did happen.

A So then you're gonna let me walk out of here?

Q I'm gonna let you walk out of here.

Q2 Because we don't think you'll do it again.

Q True. Let me—we turn this on. Let me just put the time and date and who's here and stuff. It's 12:30 p.m. It's Monday, September 15, 1986. This is Sergeant Stockard. With me is *Joel* (ph) Hard and Carl Thompson. We were just—we've been talking here for, oh I guess about an hour or so, an hour and 15 minutes. Carl has asked me to turn on this little tape recorder and I think in particular he wanted me to—to make sure that appeared on this tape the fact that I have told you repeatedly today that no matter what you tell me today about what really happened out there with you and Dixie, that I'm gonna let you walk out of here today, the same way that you walked in, and that mean. . . .

MR. HARD: And I'm repeating.

SGT. STOCKARD: That's Joel Hard too. I'm . . . .

MR. HARD: Any other trooper (indiscernible—interrupted)

Q Nobody is going to arrest you here today. You're gonna walk out of this building the same way that you walked in. I think you're going to walk out of here with a sense of relief be- [85] cause the—the terrible thing you've been carrying with you all this time is—is going to be lifted from you. You're going to finally have shared it and finally have tried to make people understand.

Q2 It aint gonna be easy but you can do it.

Q I'm going to let you hold this. The red light, of course means it's—it's recording. I'm not here to play tricks with you.

Q2 We're not liars and we're not (indiscernible). We're up front and we're honest.

Q I'm not here to—to tell lies to you or to do. . . .

Q2 And that's what we're asking you to be is up front and honest. Tell us the why, Buddy.

A Well—well. . . .

Q I know it's hard. Okay, what can I tell you, you know?

Q2 She meant the most of anybody in your life. Hlep her and help you by telling us what happened.

A Because I—I don't think you guys are going to believe me to tell you the truth.

Q2 We'll believe you.

Q Well the assure—you've got our guarantees, you're going to leave anyways no matter what, right? And that's absolutely the truth. There's no question about that and I will. . . .

A As long as you let me go take care of my stuff is all I'm asking.

* * * *

[101] Q You know, we'll have to—they'll have to work that out through the—through the system. And what

they'll probably do is come up with a summons for you and—and at that point you'll have to come in and answer it. But you're not gonna do this to anybody else. This isn't—this isn't a cold-blooded killing. You're not a danger to anybody, are you?

A No.

Q No. And you'd never let yourself get into that position again either, I know that.

A No, it's an expensive lesson to learn, a hard one, I mean.

Q Oh God, I guess.

A Plus the nightmares and everything. . . .

Q I know. I know.

A . . . . you know, you can't even imagine.

* * * *

[106] (Witness apparently reading waiver—pause)

Q Is that okay then?

A Yeah.

Q All right. Okay. Let's—why don't you sign as a witness, Joel and then I'll sign too. (ph) I guess the best thing—the best thing to do would be just ask you to drive it around and put it in our garage where it'll be safe and then, as I say, Joel can give you a ride—ride home or we can call a cab or call a friend. Whatever—whatever you want.

Q2 Call a friend for you?

A All my friends over there, my girlfriend, she don't have a vehicle.

Q Well, do you want us to just run you over there?

A Sure.

Q2 How about if I just give you a ride home.

A Have my dog with me.

Q Oh yeah, we'll take the dog home. That's—there's no problem.

Q2 You bet. I've had dogs in my car before.

Q Yeah I saw him a little bit ago.

Q2 He's almost human.

Q Yeah. Okay. Let's—let's go on out here and. . . .

Q2 I got your keys so I'll just walk you out through this.

Q Okay.

Q2 We can go this way, Carl.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 94-6615

CARL THOMPSON,

Petitioner

v.

PATRICK KEOHANE, Warden, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

January 23, 1995

(6)

No. 94-6615

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CARL THOMPSON,
Petitioner,

v.

PATRICK KEOHANE, Warden,
BRUCE M. BOTELHO, Attorney General,
State of Alaska,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR PETITIONER

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55 pp

QUESTION PRESENTED

Whether the Ninth Circuit erred in treating as a finding of fact, presumed correct under 28 U.S.C. § 2254 (d), the state court's application of the legal standard for determining "custody" under *Miranda v. Arizona*, 384 U.S. 436 (1966), to the circumstances of the case.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (JA 40-42) is unreported. The orders of the United States District Court for the District of Alaska (JA 33-38) are unreported. The opinion of United States Magistrate Judge Harry Branson (JA 25-31), as amended (JA 32), is unreported. The Alaska Supreme Court's denial of discretionary review (JA 24) is unreported. The opinion of the Alaska Court of Appeals (JA 10-23) is reported at *Thompson v. State*, 768 P.2d 127 (Alaska Ct. App. 1989). The opinion of the Alaska Superior Court for the Fourth Judicial District (JA 3-9) is unreported.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit rendered its opinion on August 11, 1994. A petition for *certiorari* was timely filed on October 31,

1994 and was granted on January 23, 1995. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amend. V:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

The text of 28 U.S.C. § 2254(d) is reprinted in the Appendix to this brief beginning at page A-1.

STATEMENT OF THE CASE

On September 10, 1986, the body of Dixie Thompson, petitioner Carl Thompson's ex-wife, was recovered from a lake in Alaska. (JA 3). In the course of his investigation into Ms. Thompson's murder, Trooper Stockard of the Alaska State Troopers contacted petitioner on September 15, 1986, and requested that he come to trooper headquarters.[1] (JA 4) Although Trooper Stockard told petitioner that the troopers needed his help in identifying property that they believed belonged to Ms. Thompson (JA 4), the request was a "pretext." (JA 26) At this time, the troopers had concluded that petitioner had killed Ms. Thompson (JA 6), and Trooper Stockard's primary reason for contacting petitioner was to question him about the murder. (JA 11)

Petitioner arrived at Alaska State Trooper headquarters in his own truck. (JA 6) He immediately identified the recovered property as Ms. Thompson's (Tr. 1-4), but was then interrogated for two hours by two plainclothes officers, Troopers Stockard and Hard, in a small interview room at trooper headquarters. (JA 6, 19) Although the troopers knew that petitioner was represented by retained counsel in connection with another

[1] Petitioner had previously spoken to investigators on September 11 and 12, 1986. (JA 4) These statements were not included in petitioner's suppression motion, *see, e.g.* (JA 5), and are not at issue in this case.

pending case (JA 7), petitioner's counsel was not present and the troopers at no time advised petitioner of his *Miranda* rights, including his right to have counsel present during the interrogation. (JA 19)

On several occasions during the tape-recorded interrogation, petitioner was told that he was not under arrest and that he could leave at any time. (JA 6, 19) However, the troopers also repeatedly informed petitioner that they knew he had killed his ex-wife and reviewed some of the evidence that they said would prove his guilt; told petitioner that they were executing a search warrant at his house and would be serving a search warrant for his truck; advised petitioner that this was his last opportunity credibly to tell them his side of the story; posited excuses for the crime, inviting claims of self-defense and heat of passion which they said would mean that petitioner would face significantly less jail time; and repeatedly suggested that the victim, not petitioner, was to blame. *See infra*, at pages 38-43.

Finally, petitioner admitted killing his wife in self-defense. (JA 27) His truck was seized at the conclusion of the interrogation. (JA 6) A trooper drove petitioner to a friend's residence (JA 6, 78), where the trooper evidently waited outside in his official vehicle. (St. 2478)[2] Petitioner was arrested approximately two hours later pursuant to a warrant based on the affidavits for the search warrants, as well as his statement. (JA 6). He was charged with first-degree murder. (JA 11)

Petitioner was subsequently indicted by a grand jury in the Alaska Superior Court for the Fourth Judicial District for first-degree murder, under Alaska Statute 11.41.100 (1994), and for tampering with physical evidence in connection with the murder, under Alaska Statute 11.56.610 (1994). (JA 10) Before trial, petitioner moved to suppress the statement he had given to

[2] Citations to "St." refer to the state court trial and appellate records which were lodged with the Supreme Court on microfiche.

the troopers on September 15 on the ground that he had not been advised of his rights prior to this custodial interrogation and thus that the statement was obtained in violation of the requirements of *Miranda v. Arizona*, 384 U.S. 436, 467-468 (1966). He also argued that the statement was involuntary and its admission violated his right to due process of law under the Fourteenth Amendment. *See, e.g.*, (JA 5, 17)

The trial court decided the motion on the papers submitted, without holding an evidentiary hearing. (St. 2503, 2530) It opined that the question of whether petitioner was in "custody" for *Miranda* purposes was a "very close" one, noting that "in viewing the conduct of the police after the statement, that is, arresting the defendant by means of a warrant within two hours of the statement, [sic] appears to be a *devious police tactic*. It would appear that the police felt they could obtain a statement implicating the defendant by doing so, letting him return home and arrest[ing] him immediately" (JA 8-9) (Emphasis added) After applying this Court's objective legal standard for determining "custody," the trial court "conclude[d]" that petitioner was not in custody for *Miranda* purposes. (JA 7-9). It also ruled petitioner's statement voluntary, and thus admissible. (JA 8)

At trial, petitioner defended on the ground that he initially stabbed Dixie Thompson in self-defense and that he had then lost control and killed her in the heat of passion. (JA 12) The prosecution played for the jury portions of the tape recording of the interrogation. (JA 19) The jury convicted petitioner of murder in the first degree and of tampering with physical evidence. (JA 10)

On appeal, the Alaska Court of Appeals affirmed petitioner's conviction. (JA 23) The Court recognized that "Judge Hodges appears to have found that the police intentionally arranged to interrogate Thompson in a non-

custodial manner to increase the likelihood that they would get a statement from him. Judge Hodges described this as a 'devious police tactic.' " (JA 16) The court, evidently applying *de novo* the legal standard for "custody" to the facts, nevertheless agreed with the lower court's conclusion that the police were not required to give petitioner *Miranda* warnings because he was not in "custody." (JA 15-17) It further held that petitioner's statement was voluntarily made. (JA 19)[3]

The Alaska Supreme Court refused discretionary review of petitioner's conviction. (JA 24) Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Alaska, claiming that his September 15 statement was involuntary and unwarned and that it therefore was admitted in evidence in violation of due process and *Miranda*. (JA 27-28) On December 29, 1992, United States Magistrate Judge Harry Branson issued an initial report and recommendation. (JA 25-31)[4] On December 8, 1993, the United States District Court for the District of Alaska filed an order denying the writ, ruling that the state court's conclusion that petitioner was not in "custody" for *Miranda* purposes was entitled to a presumption of correctness under 28 U.S.C. § 2254(d). (JA 37)

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[3] The trial court sentenced petitioner to a ninety-nine year term of imprisonment on the murder conviction and to a consecutive five year term on the tampering with evidence conviction. (JA 21) The Alaska Court of Appeals vacated the sentences and directed that the trial court impose concurrent sentences (JA 23); on remand, the trial court did so. (St. 779-780).

[4] The District Court initially approved the Magistrate Judge's report and denied the petition on February 18, 1993. (JA 33-34) Petitioner filed a motion to vacate judgment and allow a new ten-day period to file objections to the Magistrate Judge's report. (JA 35) The District Court granted the motion on July 19, 1993, and petitioner filed timely objections. (JA 35) The Magistrate Judge, after correcting a typographical error, certified his initial report and recommended it as final. (JA 32, 35)

The District Court granted petitioner's motion for a certificate of probable cause (JA 39), and he appealed the denial of the writ to the United States Court of Appeals for the Ninth Circuit. In an unpublished opinion relying upon its decision in *Krantz v. Briggs*, 983 F.2d 961 (9th Cir. 1993), the Ninth Circuit affirmed, holding that "a state court's determination that a defendant was not in custody for purposes of *Miranda* is a question of fact entitled to a presumption of correctness under 28 U.S.C. § 2254(d)." (JA 41) The Ninth Circuit concluded that the state court's "custody" determination had "fair support" in the record (JA 41), and further held that petitioner's confession was voluntary. (JA 42)

SUMMARY OF ARGUMENT

1. The historical facts surrounding petitioner's unwarned statement—the content, location and duration of the questioning and the circumstances of the interrogation—are "factual issue[s]" whose state-court resolution is presumed correct on federal habeas review under 28 U.S.C. § 2254(d). By contrast, the question whether, given the totality of these undisputed circumstances, petitioner was in "custody or otherwise deprived of his freedom of action in any significant way" such that the admission of his unwarned statement violated his rights under *Miranda*, 384 U.S. at 444, is a mixed question of law and fact that is not subject to section 2254(d)'s presumption of correctness.

2. In examining whether a suspect is in "custody" for *Miranda* purposes, the applicable standard is whether, given the totality of the relevant circumstances, a reasonable person would have understood that he or she was under arrest or that his or her freedom of movement was restrained to a degree associated with an arrest. *Stansbury v. California*, —— U.S. ——, 114 S.Ct. 1526, 1529 (1994) (*per curiam*). What a reasonable person would have believed given the totality of the uncontested circumstances is incapable of being found as an historical fact; the trier of fact cannot plumb the state of mind of this legal construct. Because the application of the objective "custody" standard requires the determination not of historical facts but of the legal significance of the facts as found, the *Miranda* "custody" inquiry is a straightforward mixed question of law and fact under the traditional definition articulated in *Townsend v. Sain*, 372 U.S. 293 (1963), and used by this Court to distinguish between "factual issues" subject to section 2254(d)'s presumption of correctness and mixed questions of law and fact whose review is unconstrained by the presumption. Although this Court has never explicitly addressed the question whether the *Miranda* "custody" inquiry is a factual issue or a mixed question of law and fact, it has implicitly recognized the essentially legal nature of the inquiry by conducting independent review of "custody" determinations.

3. The considerations of sound judicial administration relied upon by this Court in *Miller v. Fenton*, 474 U.S. 104 (1985), require that the Court continue to treat the "custody" issue as a mixed question subject to *de novo* review. The *Miranda* Court determined that only where a suspect is subjected to "custodial interrogation" is the free exercise of Fifth Amendment rights sufficiently jeopardized to require the provision of warnings which may hamper law enforcement's investigatory efforts. The Court has largely declined to forge rigid, fact-determinative rules as to when *Miranda* "custody" does or does not exist, because such rules would result in the underprotection, and overprotection, of Fifth Amendment rights in discrete cases. *See, e.g., Berkemer v. McCarty*, 468 U.S. 420, 441 (1984). Rather, the Court has applied its objective standard to the circumstances in light of the policies and Fifth Amendment values underlying the *Miranda* decision. The plenary review traditionally accorded such an inherently legal inquiry ensures in this context that neither a suspect's Fifth Amendment rights nor law enforcement's legitimate investigatory interests are unduly compromised.

4. For the very reason that, by virtue of its uniquely legal character, "the task of defining 'custody' is a slippery one," *Oregon v. Elstad*, 470 U.S. 298, 309 (1985), plenary review is also necessary to lend some measure of clarity and predictability to the application of the "custody" requirement in recurring factual situations. When the values underlying a legal rule cannot be completely articulated in a single, specific, always-serviceable standard, the isolation of generally applicable norms can be accomplished only through *de novo* review in a progression of cases. The importance of isolating these norms is manifest in the *Miranda* context because the bright-line value of the *Miranda* procedural rules for *how* custodial interrogations must be conducted will be lost absent uniform guidance on "the murky and difficult questions of *when* 'custody' begins." *Id.* at 316 (emphasis added).

ARGUMENT

I. THIS COURT'S TRADITIONAL *TOWNSEND v. SAIN* ANALYSIS AND THE FUNCTIONAL CONSIDERATIONS ARTICULATED IN *MILLER v. FENTON* DICTATE THAT THE QUESTION WHETHER A SUSPECT IS IN "CUSTODY" FOR PURPOSES OF *MIRANDA* IS A MIXED QUESTION OF LAW AND FACT NOT SUBJECT TO SECTION 2254(d)'s PRESUMPTION OF CORRECTNESS

Section 2254(d), of Title 28, United States Code, provides that in any federal proceeding in which a prisoner in custody pursuant to the judgment of a state court seeks a writ of habeas corpus, the state courts' "determination after a hearing on the merits of a *factual issue*" shall "be presumed to be correct" unless the petitioner establishes that one of eight statutory circumstances exists demonstrating that the state courts' findings of *"material facts"* were incomplete or their *"factfinding* procedure[s]" were inadequate. 28 U.S.C. § 2254(d) (emphasis added).[5]

[5] One of the eight exceptions provides that the presumption is inapplicable where the federal habeas court, reviewing the state-court record offered to support the factual finding, "on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record." 28 U.S.C. § 2254(d)(8).

The plain and repeated language of the statute establishes that the presumption of correctness applies only to state-court determinations of factual issues, and not to issues commonly denominated as questions of law or mixed questions of law and fact.

Accordingly, the Court has consistently recognized that section 2254(d)'s presumption of correctness applies only to state-court factual findings, and not to mixed questions of law and fact, which require the application of federal legal standards to the facts as found. *See, e.g., Schiro v. Farley*, —— U.S. ——, 114 S.Ct. 783, 790-791 (1994); *Miller*, 474 U.S. at 112, 115; *Wainwright v. Witt*, 469 U.S. 412, 428 n.8 (1985); *Strickland v. Washington*, 466 U.S. 668, 698 (1984); *Marshall v. Lonberger*, 459 U.S. 422, 431 (1983); *Sumner v. Mata*, 455 U.S. 591, 597 & nn.9, 10 (1982) (*per curiam*) (*"Sumner II"*); *Cuyler v. Sullivan*, 446 U.S. 335, 341-342 (1980); *Brewer v. Williams*, 430 U.S. 387, 397 & n.4, 403-404 (1977); *see also Wright v. West*, —— U.S. ——, 112 S.Ct. 2482, 2493-2498 (1992) (O'Connor, J., concurring in the judgment); *id.* at 2498-2500 (Kennedy, J., concurring in the judgment); *cf. id.* at 2489, 2491 (1992) (plurality opinion) (implicit recognition, in discussion of standard of review applied to mixed questions, that section 2254(d)'s presumption not applicable).

Instead, the Court has long held that legal questions and mixed questions of law and fact are subject to plenary federal habeas review. *See, e.g., Miller*, 474 U.S. at 112; *see also West*, 112 S.Ct. at 2498, 2500 (Kennedy, J., concurring in the judgment) (discussing "settled principle" of *de novo* habeas review of mixed questions); *id. at* 2495-2496 (O'Connor, J., concurring

in the judgment) (collecting cases).[6] "In light of the case law and Congress' position, a move away from *de novo* review of mixed questions of law and fact would be a substantial change in [the Court's] construction of the authority conferred by the habeas corpus statute." *Id.* at 2498. In the last two terms, the Court has reaffirmed its consistent practice by conducting plenary habeas review of mixed questions of law and fact. *See, e.g., Schiro*, 114 S.Ct. at 790-791; *Brecht v. Abrahamson*, — U.S. —, 113 S.Ct. 1710, 1722-1723 (1993); *id.* at 1724 (Stevens, J., concurring); *cf. Withrow v. Williams*, — U.S. —, 113 S.Ct. 1745, 1754 (1993) (due process involuntariness claims "present a legal question requiring an 'independent federal determination' on habeas") (quoting *Miller*, 474 U.S. at 112).

To distinguish between factual issues subject to section 2254(d)'s presumption of correctness and mixed issues of law and fact whose review on habeas is not constrained by section 2254(d), the Court generally has applied the traditional definitions of factual and mixed issues articulated in *Townsend v. Sain*, 372 U.S. 293. *See infra*, pages 11-13. Its analysis has also been informed by the Court's longstanding treatment of a particular issue as a question of fact, counselling for deferential review, or of law, requiring plenary consideration.

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[6] Other cases include: *Parke v. Raley*, —— U.S. ——, 113 S.Ct. 517, 526-527 (1992); *Estelle v. McGuire*, 502 U.S. 62, 67-75 (1991); *Kimmelman v. Morrison*, 477 U.S. 365, 385-390 & n.10 (1986); *Strickland v. Washington*, 466 U.S. 668, 698-701 (1984); *Marshall v. Lonberger*, 459 U.S. 422, 431-432, 436-437 (1983); *Sumner v. Mata*, 455 U.S. 591, 597 & nn.9, 10 (1982) (*per curiam*) ("*Sumner II*"); *Cuyler v. Sullivan*, 446 U.S. 335, 341-342 (1980); *Jackson v. Virginia*, 443 U.S. 307, 318, 323-326 (1979); *Manson v. Brathwaite*, 432 U.S. 98, 114-117 (1977); *Brewer v. Williams*, 430 U.S. 387, 397 & n.4, 403-404 (1977); *Donnelly v. DeChristoforo*, 416 U.S. 637, 642-643 (1974); *Neil v. Biggers*, 409 U.S. 188, 193 n.3, 199-200 (1972). *See also* Liebman and Hertz, *Federal Habeas Corpus Practice and Procedure* §§ 2.4d, 20.3d, 30.2 (2d ed. 1994).

See infra, pages 21-22. Where classification according to the traditional definitions proves difficult, as in *Miller v. Fenton*, 474 U.S. 104, the Court has further supplemented its analysis by inquiring whether practical considerations underlying the sound administration of justice militate toward treating the question as one of fact or law. *See infra*, pages 23-24. The Court's traditional *Townsend* analysis, its longstanding *de novo* treatment of the "custody" issue, and the policy considerations weighed in *Miller*, all dictate that the question whether a suspect is in "custody" and thus is entitled to the protections of *Miranda* is a mixed question of law and fact that is not subject to section 2254(d)'s presumption of correctness.

A. The *Miranda* "Custody" Determination Requires A Court To Apply An Objective Legal Standard To The Undisputed Facts, Assessing Not What Happened But The Legal Significance Of What Happened, And Is Therefore A Mixed Question Of Law And Fact Under The Court's Traditional *Townsend v. Sain* Analysis

In *Townsend v. Sain*, 372 U.S. 293, the Court, drawing upon Justice Frankfurter's separate opinion endorsed by a majority of the Court in *Brown v. Allen*, 344 U.S. 443 (1953), articulated the distinction between questions of fact and mixed questions of law and fact that serves as the basis for the Court's traditional analysis. The *Townsend* Court premised its extended discussion of the duties of federal habeas courts to hold hearings on factual issues that had not been fully, reliably or fairly found by the state courts on the following distinction:

> By "issues of fact" we mean to refer to what are termed *basic, primary, or historical* facts: facts "in the sense of a recital of external events and the credibility of their narrators . . . ." *Brown v. Allen*, 344 U.S. 443, 506 (opinion of Mr. Justice Frankfurter). *So-called mixed questions of fact and law, which require the application of a legal standard to the*

historical-fact determinations, are not facts in this sense.

372 U.S. at 309 n.6 (emphasis added).[7]

The Court has relied upon these definitions to distinguish between findings of basic, primary, or "historical" facts, which are accorded the section 2254(d) presumption of correctness, and conclusions flowing from the application of federal law to the historical facts, which are not presumed correct. *See Patton v. Yount*, 467 U.S. 1025, 1036 (1984) (juror bias is a question of "historical fact," not a mixed question); *Strickland*, 466 U.S. at 698 (performance and prejudice components of the ineffectiveness of counsel inquiry are not questions of " 'basic, primary, or historical fac[t],' " subject to section 2254(d)'s presumption but rather are mixed questions of law and fact) (quoting *Townsend*, 372 U.S. at 309 n.6); *Rushen v. Spain*, 464 U.S. 114, 120 (1983) (*per curiam*) (application of harmless error standard is a question of federal law but issue of juror impartiality is one of "historical fact" entitled to presumption of correctness); *Marshall*, 459 U.S. at 431-432, 436-437 (application of voluntariness standard for guilty pleas is a question of federal law subject to *de novo* review although underlying "historical facts" are entitled to presumption of correctness); *Sumner II*, 455 U.S. at 597 & nn.9, 10 (state determinations of "historical fact" are presumed correct but the constitutionality of pretrial identification

[7] The distinction drawn between factual issues and mixed questions of law and fact in Justice Frankfurter's opinion in *Brown v. Allen*, 344 U.S. 443, 506-507 (1953) and in the Court's opinion in *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963) was consistent with a long line of Supreme Court precedent. *See, e.g., Ker v. California*, 374 U.S. 23, 32-34 (1963); *Irwin v. Dowd*, 366 U.S. 717, 723 (1961); *Watts v. Indiana*, 338 U.S. 49, 50-51 (1949); *Baumgartner v. United States*, 322 U.S. 665, 670-671 (1944); *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 490-491 (1937); *Helvering v. Rankin*, 295 U.S. 123, 131 (1935); *Norris v. Alabama*, 294 U.S. 587, 589-590 (1935); *Fiske v. Kansas*, 274 U.S. 380, 385-387 (1927).

procedures is a mixed question of law and fact not governed by section 2254(d)); *Cuyler*, 446 U.S. at 341-342 (section 2254(d)'s presumption ruled inapplicable because whether counsel engaged in multiple representation is not a question of " 'basic, primary or historical' " fact " 'in the sense of a recital of external events and the credibility of their narrators' " but rather is "a mixed determination of law and fact that requires the application of legal principles to the historical facts of this case") (quoting *Townsend*, 372 U.S. at 309 n.6 and *Brown*, 344 U.S. at 506 (opinion of Frankfurter, J.)); *Brewer*, 430 U.S. at 397 & n.4, 403-404 ("the question of waiver [of respondent's Sixth Amendment right to the assistance of counsel] [is] not a question of historical fact, but one which, in the words of Mr. Justice Frankfurter, requires 'application of constitutional principles to the facts as found' ") (quoting *Brown*, 344 U.S. at 507 (opinion of Frankfurter, J.)) (citing *Townsend*, 372 U.S. at 309 n.6); *see also Jackson v. Virginia*, 443 U.S. 307, 318 (1979) (whether on direct or habeas review, "[a] federal court has a duty to assess the historic facts when it is called upon to apply a constitutional standard to a conviction obtained in a state court") (citing *Townsend*, 372 U.S. at 318 and *Brown*, 344 U.S. at 506-507 (opinion of Frankfurter, J.)).[8]

[8] In *Townsend*, 372 U.S. at 318, the Court stated that when an evidentiary hearing was not required, the federal habeas court "may, and ordinarily should, accept the facts"—which the Court had defined as basic, primary, or historical facts—as found in the state proceeding. In the 1966 amendment to the habeas corpus statute which added section 2254(d), Act of Nov. 2, 1966, Pub. L. 89-711, 80 Stat. 1105, "Congress elevated that exhortation into a mandatory presumption of correctness." *Miller v. Fenton*, 474 U.S. 104, 111-112 (1985). Before doing so, Congress considered *Brown*, *Townsend* and other cases in which the Court had drawn a distinction between factual issues and mixed questions. *See, e.g.*, H.R. Rep. No. 1384, 88th Cong., 2d Sess. 23-26 (1964); Liebman and Hertz, *Federal Habeas Corpus Practice and Procedure* § 2.4d, at p. 65 n.270. "When Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Con-

Employing the Court's traditional analysis, the application of the objective standard for determining whether a suspect is in "custody" for *Miranda* purposes to the totality of the circumstances of the case must be denominated a mixed question of law and fact. In *Miranda*, this Court concluded "that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not

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gress intended to adopt the interpretation placed on that concept by the courts." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 813 (1989); *see also BFP v. Resolution Trust Corp.*, —— U.S. ——, 114 S.Ct. 1757, 1764 (1994); *Kelly v. Robinson*, 479 U.S. 36, 47 (1986); *Midlantic Nat'l Bank v. New Jersey Dep't of Environmental Protection*, 474 U.S. 494, 501 (1986). In crafting section 2254(d)'s presumption of correctness for state-court determinations of "factual issues," then, Congress presumptively adopted the *Townsend* definitions of questions of fact, "'in the sense of a recital of external events and the credibility of their narrators,'" (372 U.S. at 309 n.6), and mixed questions of law and fact, involving the application of legal standards to the facts found (*id.*). *See Miller*, 474 U.S. at 112 ("there is absolutely no indication that [Congress] intended to alter *Townsend*'s understanding that the 'ultimate constitutional question' of the admissibility of a confession was a 'mixed questio[n] of fact and law' subject to plenary federal review") (quoting *Townsend*, 372 U.S. at 309 & n.6); *see also Wright v. West*, 112 S.Ct. 2482, 2498 (1992) (O'Connor, J., concurring in the judgment); *Cuyler*, 446 U.S. at 341-342 (stating that the *Townsend* opinion, "the precursor of § 2254(d)," "examined the distinction between law and fact as it applies on collateral review of a state conviction," and quoting and applying *Townsend*'s definitions); *Brewer*, 430 U.S. at 395 (stating that section 2254(d) "codifies most of the criteria set out in *Townsend v. Sain*" and applying *Townsend* definitions); *Davis v. Heyd*, 479 F.2d 446, 450 n.6 (5th Cir. 1973) ("the draftsmen of the 1966 amendments to 28 U.S.C. § 2254 used the term 'factual issue' in the same sense it was used in Townsend v. Sain"); *Imbler v. California*, 424 F.2d 631, 632 (9th Cir.) (*per curiam*) ("Section 2254(d) was drafted by a committee of the Judicial Conference of the United States composed of judges fully cognizant" of the Court's then-recent definition of mixed questions in *Townsend*), *cert. denied*, 400 U.S. 865 (1970).

otherwise do so freely." 384 U.S. at 467; *see also Withrow*, 113 S.Ct. at 1752. Accordingly, the *Miranda* Court "presumed that interrogation in certain custodial circumstances is inherently coercive and held that statements made under those circumstances are inadmissible unless the suspect is specifically informed of his *Miranda* rights and freely decides to forgo those rights." *New York v. Quarles*, 467 U.S. 649, 654 (1984) (footnote omitted); *see also Oregon v. Elstad*, 470 U.S. 298, 307 (1985). The obligation to administer *Miranda* warnings prior to any interrogation attaches where the coercive dangers sought to be remedied in *Miranda* are present, that is, "after a person has been taken *into custody or otherwise deprived of his freedom of action in any significant way*." *Miranda*, 384 U.S. at 444 (footnote omitted) (emphasis added); *see id.* at 445, 477; *California v. Beheler*, 463 U.S. 1121, 1123 (1983) (*per curiam*); *Beckwith v. United States*, 425 U.S. 341, 345-346 n.6 (1976); *see also Stansbury*, 114 S.Ct. at 1528-1529; *Oregon v. Mathiason*, 429 U.S. 492, 494-495 (1977) (*per curiam*).

In determining whether a person is in custody or otherwise deprived of his freedom of action in any significant way for purposes of *Miranda*, the Court has asked "whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Beheler*, 463 U.S. at 1125 (quoting *Mathiason*, 429 U.S. at 495); *see also Berkemer*, 468 U.S. at 440; *Minnesota v. Murphy*, 465 U.S. 420, 430 (1984). "[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury*, 114 S.Ct. at 1529. "'The only relevant inquiry is how a reasonable man in the suspect's shoes would have understood his situation.'" *Id.* (quoting *Berkemer*, 468 U.S. at 442).

The determination of *Miranda* "custody" proceeds in two steps. First, courts must identify the totality of the

relevant circumstances surrounding the interrogation. *See Stansbury*, 114 S.Ct. at 1529; *see also Beheler*, 463 U.S. at 1125. Then, the general "reasonable person" standard is applied to the facts as found. Clearly, the trial court's first-step findings constitute the determination of "factual issues" subject to section 2254(d)'s presumption of correctness if the exceptions enumerated in section 2254(d)(1)-(8) are inapplicable. Equally clearly, the second step in the process—application of the reasonable person test to the undisputed facts—fits squarely within the Court's definition of a mixed question of law and fact: "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the . . . standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982); *see also Brewer*, 430 U.S. at 403-404; *Townsend*, 372 U.S. at 309 n.6; *Brown*, 344 U.S. at 507 (opinion of Frankfurter, J.).

This is not a situation in which the application of a legal standard essentially constitutes nothing more than the finding of a single determinative fact relating to state of mind, as may be true in cases concerning, for example, intent or juror bias. *See, e.g., Witt*, 469 U.S. at 429; *Patton*, 467 U.S. at 1036-1037 & n.12; *cf. also Arave v. Creech*, —— U.S. ——, 113 S.Ct. 1534, 1541-1542 (1993). The "custody" inquiry requires review of *all* the relevant attendant circumstances and, as this Court has repeatedly emphasized, does not turn on any actor's subjective state of mind. *See, e.g., Stansbury*, 114 S.Ct. at 1526, 1529. Indeed, no amount of factfinding can resolve the central question—how, given the objective circumstances found by the trier of fact, a *reasonable person* would have undertsood the situation—because the beliefs of a fictional reasonable person are incapable of historical analysis. *Cf. Antilles Steamship Co., Ltd. v. Members of the Am. Hull Ins. Syndicate*, 733 F.2d 195, 204 (1984) (Newman, J., concurring) ("if the law's hypothetical reasonable person were to appear in the courtroom as a deus ex machina and respond to the inquiry as to what he or she thought the terms [of the contract] meant, the answer would be a matter of fact in the traditional sense—an observable, recordable historical event. But the law's reasonable person has not yet appeared on the witness stand of any courtroom. That person remains a legal construct") (footnote omitted); *cf. also Cheek v. United States*, 498 U.S. 192, 203 (1991) (to characterize knowledge and belief, which are normally questions for the factfinder, "as not objectively reasonable transforms the inquiry into a legal one and would prevent the jury from considering it").[9] The application of this legal construct to the facts to determine not what happened but "the legal significance" of what happened is a classic mixed question of law and fact. *Brown*, 344

[9] The standard of conduct applied in civil negligence cases also turns upon an assessment of the actions of a hypothetical reasonable person. Although "[t]he existence of negligence in a particular case often is said to be a mixed question of law and fact," Prosser, *Law of Torts* 205 (4th ed. 1971), "[i]n tort we prefer, as a matter of both policy and practicality, to let the jury select the particular standard of care; since it would be unsettling to say that the jury is deciding an issue of law, we prefer to say that the issue is one of fact. . . ." *Antilles Steamship Co., Ltd. v. Members of the Am. Hull Ins. Syndicate*, 733 F.2d 195, 206 (1984) (Newman, J., concurring); *see also id.* at 206 nn.4, 5. The practical "exception[]" crafted to permit a jury to apply community standards in negligence cases, *United States v. McConney*, 728 F.2d 1195, 1203-1204 (9th Cir.), *cert. denied*, 469 U.S. 824 (1984), finds no purchase here where a judge, not a jury, is called upon to make this determination by reference to the policy concerns and fundamental constitutional values underlying *Miranda*, not by application of community mores. *See infra*, at pages 24-29. The custody question arises in a fairly discrete universe of situations, not, as in negligence cases, in an infinite variety of circumstances; the determination of the custody issue in these recurring or analogous factual situations is necessary to provide uniform nationwide, not community-specific, guidance for the primary conduct of law enforcement. As discussed *infra*, at pages 29-33, as a matter of policy and practicality, this mixed question should be accorded the plenary review usually reserved for such issues.

U.S. at 507 (opinion of Frankfurter, J.); *see also Neil v. Biggers*, 409 U.S. 188, 193 n.3 (1972).

As the overwhelming majority of the circuit courts to address the question have therefore recognized, the application of the objective "custody" standard to the facts of each case is an inherently legal exercise. Seven of the nine circuits that have discussed the issue of how to categorize the *Miranda* "custody" question have concluded that it is either a mixed question or a question of law.[10]

[10] The District of Columbia, Third, Fifth, Sixth, Seventh, Tenth and Eleventh Circuits have concluded that the *Miranda* custody determination is either a question of law or a mixed question of law and fact, although there is some confusion within and among circuits on the applicable standard of review. *D.C. Circuit*: *see United States v. Baird*, 851 F.2d 376, 379 (D.C. Cir. 1988) (legal question reviewed *de novo*); *Third Circuit*: *see United States v. Calisto*, 838 F.2d 711, 716-718 & n.3 (3d Cir. 1988) (mixed question reviewed *de novo*); *United States v. Mesa*, 638 F.2d 582, 584-589 (3d Cir. 1980) (implicit *de novo* review); *id.* at 591 n.3 (Adams, J., concurring) (legal question reviewed *de novo*); *Fifth Circuit*: *see United States v. Harrell*, 894 F.2d 120, 122-125 (5th Cir.) (in reviewing custody question, court stated that "[t]he question of whether *Miranda*'s guarantees have been impermissibly denied to a criminal defendant, assuming the facts as established by the trial court are not clearly erroneous, is a matter of constitutional law, meriting *de novo* review," citing *United States v. Torkington*, 874 F.2d 1441, 1445 (11th Cir. 1989)), *cert. denied*, 498 U.S. 834 (1990); *see also United States v. Collins*, 972 F.2d 1385, 1404-1406 (5th Cir. 1992) (implicit *de novo* review), *cert. denied*, —— U.S. ——, 113 S.Ct. 1812 (1993); *Hancock v. Estelle*, 558 F.2d 786, 787-788 (5th Cir. 1977) (on habeas, implicitly reviewed *de novo* with no mention of section 2254(d)); *Sixth Circuit*: *see, e.g., Cobb v. Perini*, 832 F.2d 342, 346 (6th Cir. 1987) (on habeas, noting that "[w]hether a person is in custody is a question of law," and implicitly conducting *de novo* review), *cert. denied*, 486 U.S. 1024 (1988); *United States v. Wolak*, 923 F.2d 1193, 1196 (6th Cir.) (implicit *de novo* review), *cert. denied*, 501 U.S. 1217 (1991); *but see United States v. Mahar*, 801 F.2d 1477, 1500 & n.38 (6th Cir. 1986) (reviewed for clear error); *Seventh Circuit*: *see, e.g., United States v. Humphrey*, 34 F.3d 551, 554 n.1 (7th Cir. 1994) (mixed question reviewed *de novo*); *United States v. Levy*, 955 F.2d 1098, 1103-1104 & n.5 (7th Cir.) (mixed question but questioning *de novo* review standard), *cert. denied*, —— U.S. ——, 113 S.Ct. 102 (1992); *United States v. Hocking*, 860 F.2d 769, 772-773 (7th Cir. 1988) (mixed question reviewed *de novo*); *Tenth Circuit*: *see United States v. Griffin*, 7 F.3d 1512, 1516-1519 (10th Cir. 1993) (legal question reviewed *de novo*); *United States v. Wynne*, 993 F.2d 760, 764-765 (10th Cir. 1993) (same); *but see, e.g., Cordoba v. Hanrahan*, 910 F.2d 691, 693 (10th Cir.) (on habeas, reviewed for clear error trial court's custody determination), *cert. denied*, 498 U.S. 1014 (1990); *Eleventh Circuit*: *see United States v. Adams*, 1 F.3d 1566, 1574-1576 (11th Cir. 1993) (application of custody standard to facts reviewed *de novo*), *cert. denied*, —— U.S. ——, 114 S.Ct. 1310 (1994); *Jacobs v. Singletary*, 952 F.2d 1282, 1291 (11th Cir. 1992) (on habeas, state court's custody finding is mixed question; application of law to facts reviewed *de novo*); *Torkington*, 874 F.2d at 1445 (mixed question; application of law to facts reviewed *de novo*); *United States v. Rioseco*, 845 F.2d 299, 302 (11th Cir. 1988) (same); *Sullivan v. Alabama*, 666 F.2d 478, 482 (11th Cir. 1982) (on habeas, implicitly reviewed *de novo* without mention of Section 2254(d)); *but see Purvis v. Dugger*, 932 F.2d 1413, 1418-1419 (11th Cir. 1991) (Section 2254(d) presumption applied to state court's custody determination), *cert. denied*, 503 U.S. 940 (1992).

Another circuit, the Eighth, has acknowledged that the "custody" determination is a mixed question of law and fact, *see United States v. Mottl*, 946 F.2d 1366, 1368 (8th Cir. 1991); *United States v. Griffin*, 922 F.2d 1343, 1347-1348 (8th Cir. 1990), although it has applied section 2254(d)'s presumption of correctness to a "custody" determination. *Feltrop v. Delo*, 46 F.3d 766, 773 (8th Cir. 1995). Only the Ninth Circuit has concluded that the "custody" question is one of fact. *See, e.g., Thompson v. Keohane* (JA 40-42); *Krantz v. Briggs*, 983 F.2d 961, 963-964 (9th Cir. 1993).[11]

[11] The First, Second and Fourth Circuits have not expressly addressed the question and have applied varied standards of review. *First Circuit*: *see, e.g., United States v. Lanni*, 951 F.2d 440, 441, 443 (1st Cir. 1991) (reviewed for clear error); *United States v. Masse*, 816 F.2d 805, 808-810 & n.4 (1st Cir. 1987) (same); *Podlaski v. Butterworth*, 677 F.2d 8 (1st Cir. 1982) (per Breyer, J.) (on habeas, implicitly reviewed *de novo*); *Second Circuit*: *see, e.g., United States v. Mitchell*, 966 F.2d 92, 98 (2d Cir. 1992) (reviewed for clear error); *United States v. Kirsteins*, 906 F.2d 919, 924

No less compelling is this Court's apparent assumption, albeit without formal consideration, that *Miranda* "custody" is a question requiring plenary review. The *Miranda* Court made clear that it contemplated some flexibility in the administration of its new procedural requirements, but firmly took responsibility for enforcing *Miranda*'s basic standards. *See Miranda*, 384 U.S. at 490-491. Since that time, the Court has fulfilled this responsibility by implicitly exercising independent review of the threshold question whether a suspect is entitled to *Miranda*'s protections because he or she is in "custody," without according any stated deference to lower court determinations of the issue and regardless of whether the case involved a federal or state prosecution or arose on direct or habeas review. *See, e.g., Illinois v. Perkins*, 496 U.S. 292, 296-300 (1990) (plenary review, without stated deference to lower courts, of custodial interrogation issue); *Pennsylvania v. Bruder*, 488 U.S. 9, 10-11 (1988) (*per curiam*) (independent determination of "custody" issue without deference to state-court determination); *Berkemer*, 468 U.S. at 435-442; *Murphy*, 465 U.S. at 430-431 (*de novo* examination without stated deference to state-court determination of "custody"); *Beheler*, 463 U.S. at 1123-1126 (independent examination of "custody" determination without stated deference to lower court determinations); *Estelle v. Smith*, 451 U.S. 454, 466-469 (1981) (plenary habeas review of applicability of *Miranda* without stated deference to lower state and federal court determinations); *Mathiason*, 429 U.S. at 494-496 (independent examination of "custody" issue without according deference to lower court conclusions); *Beckwith*, 425 U.S. at 344-348 (same); *Orozco v. Texas*, 394 U.S. 324, 325-327 (1969) (same); *Mathis v. United States*, 391 U.S. 1, 3-5 (1968) (same); *cf. Stansbury*,

(2d Cir. 1990) (accepting facts found by District Court but apparently conducting *de novo* review of application of standard to those facts); *Fourth Circuit*: *see, e.g., United States v. Cooper*, 800 F.2d 412, 414-415 (4th Cir. 1986) (implicitly reviewed *de novo*); *Davis v. Allbrooks*, 778 F.2d 168, 170-172 (4th Cir. 1985) (same).

114 S.Ct. at 1530-1531; *United States v. Calisto*, 838 F.2d 711, 718 n.3 (3d Cir. 1988); *United States v. Mesa*, 638 F.2d 582, 591 n.3 (3d Cir. 1980) (Adams, J., concurring).

For example, in *Berkemer v. McCarty*, 468 U.S. 420, the Court faced on habeas review the issue whether, by virtue of a pre-arrest traffic stop, the respondent could be deemed to have been in "custody" for *Miranda* purposes. Although the state and lower federal courts had not reached the issue, the Court did not remand for further factfinding, instead conducting a *de novo* review of the question.[12]

The fact that the Court has consistently, if implicitly, understood the threshold "custody" question to be one requiring plenary review demonstrates the legal nature of the inquiry, and is an important factor in its own right

[12] In *Berkemer v. McCarty*, 468 U.S. 420 (1984), the respondent made unwarned statements in response to roadside questioning during a traffic stop, and gave further unwarned statements after his arrest for operating a car under the influence of drugs or alcohol. The state courts, and the federal District Court on habeas review, ruled that *Miranda* was inapplicable to misdemeanor traffic violations and thus that the statements were properly admitted against the respondent. *Id.* at 424-425. The Sixth Circuit reversed, holding that *Miranda* warnings must be given to all individuals prior to custodial interrogation regardless of the classification of the offense under investigation. *Id.* at 425. However, because the Sixth Circuit held that the respondent's conviction would be vacated and the writ issued due to the improper use of his unwarned post-arrest statements, its opinion was "uncertain as to the status of the prearrest confessions." *Id.* at 426; *see also id.* at 435 n.23. The Supreme Court affirmed the Sixth Circuit's holding with respect to the post-arrest statements. *Id.* at 434-435. In part because "the relevance of *Miranda* to the questioning of a motorist detained pursuant to a traffic stop is an issue that plainly warrants our attention, and with regard to which the lower courts are in need of guidance," the Court went on independently to apply the *Miranda* custody standard to the pre-arrest circumstances of the traffic stop even though the lower courts did not address this issue, ultimately determining that the respondent was not in custody. *Id.* at 435-436 & n.23, 441-442.

in determining the appropriate characterization of the question in future. *Cf. Miller*, 474 U.S. at 109-112, 115 (emphasizing importance of Court's traditional treatment of the voluntariness issue); *cf. also Pierce v. Underwood*, 487 U.S. 552, 558 (1988); *Pullman-Standard*, 456 U.S. at 287-288.[13]

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[13] The Court's treatment of the "custody" question is consistent with its treatment of other, similar issues concerning the scope and content of *Miranda*'s requirements, particularly its plenary review of the question whether a suspect has been subjected to custodial "interrogation" within the meaning of *Miranda*. For example, in *Arizona v. Mauro*, 481 U.S. 520, 527-529 n.6 (1987), the Court independently applied the "legal standard" for *Miranda* "interrogation," explicitly stating that it was not overturning any "factual findings" in rejecting the Arizona Supreme Court's determination that the defendant was subjected to custodial "interrogation." *See also Rhode Island v. Innis*, 446 U.S. 291, 302-304 (1980) (vacating and remanding Rhode Island Supreme Court's ruling that defendant was "interrogated" within the meaning of *Miranda*); *cf. Pennsylvania v. Muniz*, 496 U.S. 582 (1990) (plurality opinion) (vacating Pennsylvania Superior Court's ruling that certain questions constituted "interrogation," holding, *inter alia*, that the questions fell within the routine booking question exception to *Miranda*); *United States v. Taylor*, 985 F.2d 3, 7 n.5 (1st Cir.) (need for plenary review of *Miranda* "interrogation" is implicit in the Supreme Court's cases), *cert. denied*, —— U.S. ——, 113 S.Ct. 2426 (1993). Similarly, the Court has exercised apparent plenary review, without suggesting that any deference is due lower court determinations, largely to ensure that *Miranda*'s requirements are not read too broadly in: (1) assessing the adequacy of any warnings given, *see, e.g., Duckworth v. Eagan*, 492 U.S. 195, 200-205 (1989) (on habeas review, reversing Seventh Circuit's holding that warnings were inadequate under *Miranda*); *California v. Prysock*, 453 U.S. 355, 361 (1981) (*per curiam*) (reversing California Court of Appeals' holding that *Miranda* warnings were inadequate); *see also United States v. Cruz*, 910 F.2d 1072, 1078 & nn.2, 3 (3d Cir. 1990) (adequacy of *Miranda* warnings treated by the Supreme Court as a legal issue), *cert. denied*, 498 U.S. 1039 (1991); (2) determining what circumstances constitute an invocation of the right to counsel and the right to remain silent, *see, e.g., McNeil v. Wisconsin*, 501 U.S. 171, 175-180 (1991) (affirming Wisconsin Supreme Court's ruling that accused's request for counsel at initial appearance on charged offense does not constitute invocation of counsel for *Miranda* purposes on other charges); *Connecticut v. Barrett*, 479 U.S. 523, 526-530 & n.1 (1987) (reversing Connecticut Supreme Court's ruling that a request for counsel prior to making a written statement constitutes an invocation of respondent's right to counsel for all purposes); *Oregon v. Bradshaw*, 462 U.S. 1039, 1045-1046 (1983) (reversing Oregon Court of Appeals' holding that inquiry respondent made to police officer did not "initiate" conversation); *Fare v. Michael C.*, 442 U.S. 707, 716-724 (1979) (reversing California Supreme Court's holding that a juvenile suspect's request for his probation officer was a *per se* invocation of Fifth Amendment rights); and (3) determining the circumstances in which the "public safety" exception to *Miranda* may be invoked, *see, e.g., New York v. Quarles*, 467 U.S. 649, 655-658 (1984); *id.* at 677 (Marshall, J., dissenting).

B. The Uniquely Legal Nature Of *Miranda* "Custody" Determinations And Practical Imperatives Of Sound Judicial Administration Require That, Consistent With The Functional Principles Articulated By The Court In *Miller v. Fenton*, Such "Custody" Determinations Be Reviewed *De Novo*

The Court's decision in *Miller v. Fenton*, 474 U.S. at 113-114, suggests a framework for decision where the application of the traditional *Townsend* definitions is difficult and the distinction between a question of fact and a mixed question of law and fact in a particular case proves elusive. Although this is not such a case, in that the traditional *Townsend* analysis compels the conclusion that *Miranda* "custody" is a mixed question, *Miller* underscores the wisdom of that conclusion.

The *Miller* Court determined that the Fourteenth Amendment due process inquiry into the voluntariness of a confession is an essentially legal inquiry, to be reviewed *de novo*. In analyzing this question, the Court acknowledged that "[p]erhaps much of the difficulty in this area stems from the practical truth that the decision to label an issue a 'question of law,' a 'question of fact,' or a 'mixed question of law and fact' is sometimes as much a matter of allocation as it is of analysis." *Id.* at 113-114 (citing Monaghan, *Constitutional Fact Review*,

85 Colum. L. Rev. 229, 237 (1985)). The *Miller* Court declined to base this "allocation" decision upon the fortuity of whether the issue is raised on habeas review or on direct appeal. *See Miller*, 474 U.S. at 110-111. Rather, it suggested that issues which are difficult to classify using traditional definitions may be "allocated" to law or to fact on the basis of the relative institutional expertise of trial and reviewing courts, be they state or federal:

> At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, *as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.*

Id. at 114 (emphasis added); *see also Pierce*, 487 U.S. at 559-560; *Rushen*, 464 U.S. at 120; *United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir.) (applying functional analysis in holding that the question whether exigent circumstances exist is a mixed question subject to plenary review), *cert. denied*, 469 U.S. 824 (1984).

1. *The* Miranda *"Custody" Question, Like The Due Process Voluntariness Inquiry, Requires Courts To Exercise Judgment About The Values That Animate The Legal Principle And Thus Is A Primarily Legal Question Best Reviewed* De Novo.

Where the "nature of the inquiry," *Miller*, 474 U.S. at 115, requires courts to consider "legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles," functional considerations dictate that the inquiry be subject to plenary review. *McConney*, 728 F.2d at 1202. Thus, the *Miller* Court examined the nature of the due process voluntariness inquiry and determined that because of its "hybrid quality," "subsuming, as it does, a 'complex of values,'"

the inquiry has "a uniquely legal dimension" and cannot appropriately be treated as a question of fact. *Miller*, 474 U.S. at 116 (citation omitted). In such circumstances, the trier of fact is not in an "appreciably better position" to determine the predominantly legal issue, *id.* at 117; rather, reviewing courts must exercise their traditional "obligation to say what the law is." *West*, 112 S.Ct. at 2497 (O'Connor, J., concurring in the judgment); *see also* Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. at 275; *McConney*, 728 F.2d at 1201 (plenary review in such circumstances is appropriate because appellate decision-makers are better positioned to make, and more experienced in making, these determinations). The Court's application of the *Miranda* "custody" standard ultimately has rested on value judgments about the applicability of the Fifth Amendment concerns animating the *Miranda* decision to the situation at issue. It is the traditional function of reviewing courts, and particularly this Court, to exercise the control that plenary review of this essentially legal inquiry permits, so that suspects' free exercise of their Fifth Amendment rights, as well as law enforcement's legitimate investigatory interests, are neither underprotected nor overprotected.

In its "custody" precedents over the years, the Court has chosen to address certain recurring factual situations as to which the lower courts required guidance or correction, *see, e.g., Berkemer*, 468 U.S. at 435-436 n.23; *Beckwith*, 425 U.S. at 342, and has separated on a case-by-case basis those factors deemed probative from those deemed irrelevant. *See, e.g., Stansbury*, 114 S.Ct. at 1529-1530; *Beheler*, 463 U.S. at 1125. In so doing, the Court has rejected arguments that one circumstance—apart from actual arrest—should be conclusive for purposes of determining that a defendant is or is not in custody. *See, e.g., Stansbury*, 114 S.Ct. at 1530 (officer's articulated belief that defendant is the prime suspect, while relevant, is not dispositive); *Berkemer*, 468 U.S. at 436-437, 440-441 (fact that traffic stop is a Fourth

Amendment "seizure" does not mean that the motorist is therefore in *Miranda* "custody" but circumstances of a traffic stop may rise to level of "custody"); *Orozco*, 394 U.S. at 326-327 (*Miranda* not inapplicable simply because defendant was interrogated at home as opposed to at stationhouse). Thus, the Court has not limited *Miranda*'s applicability to formal felony arrests, *see Berkemer*, 468 U.S. at 434-435, 440, but has also refused to extend *Miranda*'s requirements to all " 'coercive environment[s].' " *Mathiason*, 429 U.S. at 495; *see also Beheler*, 463 U.S. at 1124. Even the fact that a defendant is actually in custody, in the sense of being physically incarcerated, may not automatically translate into "custody" for *Miranda* purposes. *Perkins*, 496 U.S. at 299 ("[t]he bare fact of custody may not in every instance require a warning even when the suspect is aware that he is speaking to an official"); see *also United States v. Menzer*, 29 F.3d 1223, 1230-1233 (7th Cir.) (applying *de novo* review and holding that incarceration does not, *per se*, render an interrogation custodial), *cert. denied*, —— U.S. ——, 115 S.Ct. 515 (1994).

Forsaking the application of fact-bound formulas, the Court has instead assessed the significance of the restraint a reasonable person would have perceived in the circumstances in light of the values underlying the *Miranda* decision. The analytical focus is whether the interrogation situation is sufficiently coercive that *Miranda*'s protections are necessary to shield the accused's free exercise of his or her constitutional right to be free from compelled self-incrimination. *See, e.g., Perkins*, 496 U.S. at 296 (circumstances did not constitute "custodial interrogation" because "conversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*"); *Berkemer*, 468 U.S. at 437; *Murphy*, 465 U.S. 430-433 (probation interview not an inherently coercive setting so as to require *Miranda* warnings); *see also Bruder*, 488 U.S. at 10-11; *Beckwith*, 425 U.S. at 345, 347; *Mathis*, 391 U.S. at 4.

For example, in *Berkemer*, the Court declined to "accord talismanic power" to the *Miranda* definition of "custodial interrogation," explaining that:

> Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, *but only in those types of situations in which the concerns that powered the decision are implicated.* Thus, we must decide whether a traffic stop *exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights.*

468 U.S. at 437 (emphasis added). The *Berkemer* Court considered the typical circumstances of a traffic stop in light of the concerns driving the *Miranda* Court and concluded that a traffic stop generally presented a "comparatively nonthreatening" environment not necessitating the provision of *Miranda* warnings. *Id.* at 440; *see also id.* at 435-439; *Bruder*, 488 U.S. at 10-11. While the Court stated that the "noncoercive aspects of ordinary traffic stops" generally mean that persons temporarily detained pursuant to such stops are not in "custody" for *Miranda* purposes, the Court made clear that if a motorist, during a traffic stop, "is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*." *Berkemer*, 468 U.S. at 440; *see also Bruder*, 488 U.S. at 10-11, nn.1, 2.

The *Berkemer* Court recognized that its refusal to adopt a rule providing simply that *Miranda* does not apply to traffic stops meant that "police and lower courts will continue occasionally to have difficulty deciding exactly when a suspect has been taken into custody." *Berkemer*, 468 U.S. at 441. However, the Court found this flexible approach necessary to ensure that the proper balance is achieved in each case between society's fundamental interest in protecting citizens' Fifth Amendment rights and its interest in promoting the enforcement of the Nation's traffic laws. *Id.* at 441 & n.33.

As *Berkemer* illustrates, the Court has used the custodial interrogation requirement to distinguish between those situations in which the coercive aspects of an interrogation threaten the free exercise of Fifth Amendment rights and those situations in which the threat is sufficiently attenuated that it cannot overcome the public's legitimate interest in the questioning of crime suspects. *See also Perkins*, 496 U.S. at 296-297, 300. This quintessentially legal analysis enables the Court to control the balance struck between fundamental Fifth Amendment values and legitimate law enforcement interests in recurring factual situations.

Consistent with this underlying purpose of the threshold "custody" requirement, the Court has exercised its plenary authority to ensure that *Miranda*'s protection of Fifth Amendment values is not inappropriately diluted. *See Berkemer*, 468 U.S. at 429-442; *Estelle*, 451 U.S. at 466-469 (affirming Fifth Circuit's ruling, on habeas review, that admission in capital sentencing proceeding of respondent's unwarned statements made during a court-ordered psychiatric examination violated his Fifth Amendment privilege against self-incrimination); *Orozco*, 394 U.S. at 324-327 (reversing Texas Court of Criminal Appeals' ruling that *Miranda* warnings were not required because petitioner was interrogated in his own bed, in familiar surroundings); *Mathis*, 391 U.S. at 4-5 (reversing federal courts' determination that *Miranda* protections are only applicable to questioning of a suspect in custody in connection with the very case under investigation).

The Court, however, has also declined to apply *Miranda*'s requirements in situations that do "not present the elements which the *Miranda* Court found so inherently coercive as to require its holding." *Beckwith*, 425 U.S. at 347. Indeed, in most of the cases in which the Court has addressed the threshold custodial interrogation issue, it has exercised its *de novo* review to ensure that the interests of law enforcement are not unduly impaired

where the totality of the objective circumstances do not reveal a need to shelter a suspect's constitutional right to be free from compelled self-incrimination. *See, e.g., Perkins*, 496 U.S. at 294-300 (reversing Appellate Court of Illinois' determination that the incarcerated defendant was subjected to custodial interrogation by undercover agent within the meaning of *Miranda*); *Bruder*, 488 U.S. at 10-11 (*per curiam*) (reversing Pennsylvania Superior Court's ruling that defendant was subjected to custodial interrogation during traffic stop); *Murphy*, 465 U.S. at 426-434 (reversing Minnesota Supreme Court's holding that statements made by a probationer to his probation officer were obtained in violation of his Fifth Amendment rights, and ruling that probationer was not subjected to custodial interrogation); *Beheler*, 463 U.S. at 1121-1125 (*per curiam*) (reversing California Court of Appeal's holding that respondent was in "custody"); *Mathiason*, 429 U.S. at 494-496 (*per curiam*) (reversing Oregon Supreme Court's holding that respondent was in "custody"); *Beckwith*, 425 U.S. at 344-348 (affirming lower federal courts' holdings that the fact that defendant was the focus of the investigation did not render *Miranda* applicable); *see also Stansbury*, 114 S.Ct. at 1530 (*per curiam*) (reversing California Supreme Court's application of "custody" standard to facts, ruling that the state court improperly considered officer's subjective and unarticulated beliefs and erroneously concluded that petitioner's *Miranda* rights were triggered because petitioner was the focus of the officers' suspicions); *cf. also supra*, footnote 13.

2. *The Need For Consistency And Uniformity In The Application Of The "Custodial Interrogation" Threshold Test, And The Precedential Importance Of Such Determinations In Guiding Official Conduct, Require That The "Custody" Issue Be Subject To Independent Review.*

Precisely because the "task of defining 'custody' is a slippery one," *Elstad*, 470 U.S. at 309, in that the "custody" inquiry is a predominantly legal exercise requir-

ing application of the objective standard in light of the values underlying the *Miranda* decision, *de novo* review of "custody" determinations is mandated by imperatives of sound judicial administration. Plenary review permits reviewing courts not only to police the application of the *Miranda* "custody" requirement in light of Fifth Amendment concerns present in specific contexts, *see supra*, pages 24-29, it also promotes some measure of consistency in the case-by-case development of the "custody" standard, and thus provides specific guidance to all actors in the criminal justice system who must rely upon judicial precedents to guide their conduct.

The Court has recognized that where "the content of the rule is not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common-law adjudication," the standard should be treated as one of law, subject to plenary review. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 502 (1984) (*de novo* standard, not Fed. R. Civ. P. 52(a) clearly erroneous standard, applicable to review of determination of actual malice in cases governed by *New York Times v. Sullivan*, 376 U.S. 254 (1964)); *see also Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989) (same); *Miller*, 474 U.S. at 114; Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. at 229, 273-276. In such circumstances, the purely "legal" function of saying "what the law is" can only be accomplished by applying the relevant standard to a series of closely related situations that require the elaboration of the basic legal norm. *See id.* at 273-276; *Miller*, 474 U.S. at 114. The exercise of this plenary review power "is the process through which the rule itself evolves and its integrity is maintained." *Bose Corp.*, 466 U.S. at 503 (footnote omitted).

As explained *supra*, pages 24-29, the *Miranda* "custody" standard, like the Fourth Amendment reasonableness standard, is not "susceptible of Procrustean application." *Ker v. California*, 374 U.S. 23, 33 (1963). The

"custody" cases are akin in this fundamental respect to the effectiveness of counsel cases and the voluntariness cases, in which plenary review is appropriately applied: by adopting a standard to be applied to the "totality of the circumstances," the Court invites the case-by-case development of a body of precedents that, when considered together, provide guidance as to future applications of the legal standard. *See, e.g., Miller*, 474 U.S. at 114; *cf. Alston v. Redman*, 34 F.3d 1237, 1245 (3d Cir. 1994), *cert. denied*, —— U.S. ——, 115 S.Ct. 1122 (1995); *Mesa*, 638 F.2d at 584. To provide guidance as to the developing "custody" standard, this Court has applied it in recurring factual situations, culling the relevant factors from the irrelevant, and deciding whether the resulting mix of circumstances, as weighted and approved by the Court in light of the Fifth Amendment values underlying *Miranda*, yields a result contrary to that determined below. *See, e.g., Stansbury*, 114 S.Ct. at 1529-1530 (discussing relevancy and weight of certain factors in resolving "custody" question in the context of stationhouse questioning); *Beheler*, 463 U.S. at 1125 (certain factors irrelevant to determination of "custody" in stationhouse questioning context); *Mathiason*, 429 U.S. at 495-496 (same). Where, as here, the "relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law." *Miller*, 474 U.S. at 114.

This principle is particularly important in the *Miranda* context. *Miranda* "has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation," and "[t]his gain in specificity . . . benefits the accused and the State alike." *Fare v. Michael C.*, 442 U.S. 707, 718 (1979). Incoherence in the "custody" precedents upon which law enforcement must rely would ultimately endanger the core

value of *Miranda*—the clear rules it provides police and courts on the conduct of a custodial interrogation—because police officers and courts would no longer be certain as to when those rules are applicable. *Cf. Fare v. Michael C.*, 439 U.S. 1310, 1314 (1978) (Rehnquist, Circuit Justice, granting application for stay) (noting that the precision of *Miranda* "would be eviscerated if the prophylactic rules were freely augmented by other courts"); *cf. also Oregon v. Hass*, 420 U.S. 714, 719 (1975). *Miranda* "custody" determinations therefore have a unique claim on the "normal law-clarifying benefits that come from an appellate decision on a question of law." *Pierce*, 487 U.S. at 561.

Given the frequency with which this Court has found it necessary to correct state and federal courts' application of the "custody" standard, the potential for disuniformity in the application of this threshold inquiry is demonstrably great. *See supra*, cases cited at pages 28-29, *Berkemer*, 468 U.S. at 435-436 n.23.[14] Were the "custody" determination to be treated as a question of fact, subject to correction only if not fairly supported in the record or clearly erroneous, state and federal reviewing courts would be required to affirm irreconcilable "custody" decisions made on analogous facts. As long as the trial judge's opinion rests on some defensible application of the standard, reviewing courts and this Court would have to defer, even though the trial judge's application of the legal standard were deemed wrong, or perhaps worse, inconsistent with other trial judges' rul-

[14] *See also Bradley v. Ohio*, 497 U.S. 1011, 1012 (1990) (Marshall, J., dissenting from denial of a writ of *certiorari*); *Maine v. Thibodeau*, 475 U.S. 1144, 1145 (1986) (Burger, C.J., dissenting from denial of a writ of *certiorari*) (objecting to Maine Supreme Court's reliance, in resolving the custody question, on factors that had been rejected by either the Court or other state and federal courts, and concluding that the Maine Supreme Court's decision "*illustrates an acute need for clarification of the proper factors to be considered in making the 'in custody' determination*") (emphasis added).

ings. The outcome of *Miranda* claims would not only be difficult to predict, but would vary from State to State, Circuit to Circuit, and within jurisdictions. The result would be jurisdictional disparities not only in the degree of Fifth Amendment protection accorded suspects in a given situation, but also in the standards of conduct the law enforcement community must follow. "Neither the police nor criminal defendants would benefit from such a development." *Berkemer*, 468 U.S. at 432.

3. *The Objective "Custody" Test Does Not Rely For Its Effective Application On Credibility Determinations Or Determinations Of Subjective Intent And Thus Its Resolution Does Not Require The Particular Expertise Of Trial Courts.*

The Court has found that there are certain mixed questions of law and fact which, being "rooted in factual determinations," *Cooter & Gell v. Hartmax*, 496 U.S. 384, 401 (1990), are "essentially factual," *Pullman-Standard*, 456 U.S. at 288, and should be reviewed deferentially. *See Witt*, 469 U.S. at 429; *McConney*, 728 F.2d at 1203 (discussing "exception" made for certain essentially factual questions). Under the Court's functional analysis, the determinative test of whether a question should be deemed essentially factual is whether the trier of fact, by virtue of its superior ability to judge witnesses' demeanor and credibility, is in an "appreciably better position" to resolve the issue in question than the reviewing court. *Miller*, 474 U.S. at 117; *see also id.* at 114, 116-117; *Cooter & Gell*, 496 U.S. at 401-403; *Rushen*, 464 U.S. at 120-122 & n.6.[15]

[15] An additional consideration is the extent to which the determination involves " 'multifarious, fleeting, special, narrow facts that utterly resist generalization,' " *Cooter & Gell v. Hartmarx*, 496 U.S. 384, 404 (1990) (quoting *Pierce v. Underwood*, 487 U.S. 552, 561-562 (1988)), such that the precedential value of the decision is limited. As discussed *supra*, pages 29-33, this consideration does not apply in the "custody" context: courts can, and must, provide guidance as to the relevance and weight of

Where the issue turns on the determination of subjective state of mind, and thus largely on witness credibility, the Court has generally treated it as one of historical fact because the trial judge is deemed best situated to resolve credibility issues. For example, when considering the question of juror bias, the "fundamental role" that the juror's demeanor plays in the determination of the juror credibility issue requires that deference be paid to the trier of fact. *Patton*, 467 U.S. at 1038 & n.14; *see also Mu'min v. Virginia*, 500 U.S. 415, 424 (1991); *id.* at 433 (O'Connor, J., concurring); *Witt*, 469 U.S. at 429; *Rushen*, 464 U.S. at 120-122 & n.6. Because the question of a defendant's competency turns largely on a first-hand assessment of the quality of the defendant's mental functioning and the credibility of expert testimony, the competency issue also has been deemed a question of fact for purposes of section 2254(d). *See, e.g., Maggio v. Fulford*, 462 U.S. 111, 113, 117-118 (1983); *Demosthenes v. Baal*, 495 U.S. 731, 735 (1990) (*per curiam*); *but see Drope v. Missouri*, 420 U.S. 162, 174-175 & n.10 (1975). Similarly, "[t]reating issues of intent as factual matters for the trier of fact is commonplace." *Pullman-Standard*, 456 U.S. at 288; *see also United States Postal Service Bd. of Govs. v. Aikens*, 460 U.S. 711, 716-717 (1983); *Oregon v. Kennedy*, 456 U.S. 667, 675, 679 (1982). This is so because the finding of intent " 'largely will turn on evaluation of credibility.' " *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (plurality opinion) (quoting *Batson v. Kentucky*, 476 U.S. 79, 98 n.21 (1986); *see also Hernandez*, 500 U.S. at 364-365; *Pullman-Standard*, 456 U.S. at 284-289.

These principles have no applicability in this context because this Court has expressly declined to found "custody" determinations on any actor's state of mind. *See supra*, pages 15-17. In resolving *Miranda* "custody"

particular circumstances in recurring interrogation situations so that the law enforcement community has some rules upon which it can safely rely.

questions, even more so than in judging due process voluntariness claims, "assessments of credibility and demeanor are not crucial to the proper resolution of the ultimate issue." *Miller*, 474 U.S. at 116-117. To the extent that credibility issues arise regarding the circumstances of the interrogation, the state courts' resolution of those issues, like its determination of the other historical facts, will be presumed correct, if fairly supported, under section 2254(d). *Cf. Rushen*, 464 U.S. at 120-122 & n.6; *Maggio*, 462 U.S. at 113; *Marshall*, 459 U.S. at 432-435. However, once the moment comes for determining whether, given the totality of the relevant facts found, the concerns underlying *Miranda* require the invocation of *Miranda*'s protections, the court is required to make legal value judgments, not assessments of demeanor or veracity. Accordingly, the trial court is not in "an appreciably better position than the federal habeas court to make that determination." *Miller*, 474 U.S. at 117.[16]

C. Considerations Of Federalism And Finality Do Not Require That The Application Of The *Miranda* "Custody" Standard To The Circumstances Be Treated As A Question Of Fact

By promoting uniformity and consistency in the application of the *Miranda* standard in and among federal and state courts, *de novo* review fosters, rather than inhibits, federal-state relations. A State has "a weighty interest in having valid federal constitutional criteria

[16] Other considerations relevant to the sound administration of justice which counsel deference to the *factual* determinations of trial courts are equally irrelevant here. There is no threat posed to accuracy in factfinding because belated reconstruction of historical facts is not required; only the legal significance of the uncontested facts is at issue. For much the same reason, plenary review does not unduly tax judicial resources. Indeed, *de novo* determination of the "custody" issue would appear to involve no greater expenditure of time than is necessarily involved in evaluating whether a state-court determination finds "fair support" in the record.

applied in the administration of its criminal law by its own courts." *Rogers v. Richmond*, 365 U.S. 534, 548 (1961). To the extent that " '[a] healthy federalism depends upon the avoidance of needless conflict between state and federal courts,' " *Ker*, 374 U.S. at 31 (quoting *Elkins v. United States*, 364 U.S. 206, 221 (1960)), " '[f]ederal-state cooperation in the solution of crime under constitutional standards will be promoted . . . by recognition of their . . . mutual obligation to respect *the same fundamental criteria* in their approaches.' " *Ker*, 374 U.S. at 31 (emphasis in original) (quoting *Mapp. v. Ohio*, 367 U.S. 643, 658 (1961)). Only plenary review will ensure that there is some consistency and uniformity in the identification and application of the criteria to be considered in determinations of "custody." *See supra*, pages 29-33.

Any possible tension created by plenary federal review must be regarded as negligible in light of this Court's decision in *Withrow v. Williams*, 113 S.Ct. 1745. In *Withrow*, the Court concluded:

> One might argue that tension results between the two judicial systems whenever a federal habeas court overturns a state conviction on finding that the state court let in a voluntary confession obtained by the police without the *Miranda* safeguards . . . . It is not reasonable, however, to expect such occurrences to be frequent enough to amount to a substantial cost of reviewing *Miranda* claims on habeas or to raise federal-state tensions to an appreciable degree.

Id. at 1754-1755. Because "eliminating review of *Miranda* claims would not . . . advance the cause of federalism in any substantial way," (*id.* at 1754), eliminating *de novo* review of a small subset of that universe of claims—those challenging *Miranda* "custody" determinations—would have even less consequence for federal-state relations. *See also O'Neal v. McAninch*, —— U.S. ——, 115 S.Ct. 992, 998 (1995) (state's interest diminished

by legal circumstance that state "bears responsibility for the error that infected the initial trial").

Nor is such review likely to imperil legitimate finality interests. If a petitioner is effectively foreclosed by a ruling that he was not in "custody" from pursuing a *Miranda* claim, he will recast his claim as a due process challenge to the voluntariness of his confession. *Withrow*, 113 S.Ct. at 1754. Given that the Court "could lock the front door against *Miranda*, but not the back," little would be gained from deciding that habeas-related considerations of federalism and finality require that the "custody" issue be treated as one of fact. *Id.* at 1754.

II. SHOULD THE COURT DECIDE TO ADDRESS THE ISSUE, RATHER THAN REMANDING FOR PLENARY CONSIDERATION IN THE FIRST INSTANCE BY THE NINTH CIRCUIT, PETITIONER WAS IN "CUSTODY" FOR *MIRANDA* PURPOSES ON THE OBJECTIVE FACTS OF THIS CASE

The Ninth Circuit, relying on the presumption of correctness accorded state-court factual findings, did not independently review the mixed question whether this petitioner was in "custody or otherwise deprived of his freedom of action in any significant way" such that the admission of his unwarned statement violated his rights under *Miranda*. (JA 40-42) The issue whether petitioner was actually in "custody" for *Miranda* purposes on the undisputed facts of the case was not raised in the petition for *certiorari* or in the State of Alaska's opposition to the petition. Accordingly, the appropriate disposition would be to reverse and remand the issue for consideration in the first instance by the Ninth Circuit. *See* Sup. Ct. R. 24(a); *see also Stansbury*, 114 S.Ct. at 1531 (remanding for further proceedings); *Miller*, 474 U.S. at 118 (same).

Should the Court determine that it wishes to reach this issue to provide additional guidance to the lower courts in the application of the "custody" standard, *see, e.g.*,

Berkemer, 468 U.S. at 435-436 n.23, petitioner submits that, given the coercive custodial environment demonstrated on this record, a reasonable person would have concluded that his freedom was significantly restrained.

Petitioner was asked to come down to the police station. Although expecting merely to identify his ex-wife's effects, a procedure which was complete within minutes (Tr. 1-4), he was instead taken to a small interrogation room where two state troopers brought to bear on petitioner *all* of the "psychologically . . . oriented" police practices that were relied upon by the *Miranda* Court in substantiating the "inherently coercive" nature of the stationhouse interrogations at issue in that case. *Miranda*, 384 U.S. at 448, 467; *see also Beckwith*, 425 U.S. at 346 n. 7.

First, the police officers isolated petitioner in the unfamiliar, police-dominated environment of the stationhouse —a factor deemed significant in *Miranda* and subsequent cases. *See, e.g., Murphy*, 465 U.S. at 433; *Berkemer*, 460 U.S. at 438; *Beckwith*, 425 U.S. at 346 n.7; *Miranda*, 384 U.S. at 448-450, 457. Then, "[t]o highlight the isolation and unfamiliar surroundings," the troopers "display[ed] an air of confidence in the suspect's guilt and from outward appearance . . . maintain[ed] only an interest in confirming certain details." *Id.* at 450. The troopers confronted petitioner with mounting evidence of his guilt,[17] told him that his house was in the process of being searched, and informed him that a search warrant for the truck he drove to the police station was "gonna

[17] For example, they told him that his friends were "pointing at [him]" (JA 45), that the murder weapon had been recovered (JA 54), that the tire tracks at the location where the body had been recovered matched the tracks of his truck (JA 45, 61), that the physical evidence was at that moment being examined by the "wizards" in the state technical laboratory (JA 64), and that the police possessed a "tremendous number" of additional facts evidencing petitioner's guilt that they would not yet disclose. (JA 47, 50, 54, 59, 61-62)

be served." (JA 50). They repeatedly assured petitioner that they believed absolutely in his guilt, *see, e.g.* (JA 53) ("you killed Dixie . . . . There's no question about that"), and that they could "prove conclusively beyond a reasonable doubt" (JA 49) that petitioner had committed the crime.[18] The troopers' articulated views regarding petitioner's culpability, although not dispositive, are obviously material to the "custody" determination. *See Stansbury*, 114 S.Ct. at 1530.

"[T]o put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty," the troopers "minimize[d] the moral seriousness of the offense" and "cast blame on the victim." *Miranda*, 384 U.S. at 450 (footnote omitted). They emphasized that they did not believe that petitioner was a "cold-blooded killer," (JA 53-54, 59), or that he had planned to kill his ex-wife (JA 51, 53-54, 59-60, 73). They suggested instead, time and time again, that "what happened was entirely her fault" (JA 72) and that the crime was one that "this foolish bitch brought on herself really." (JA 46)[19]

[18] *See also* (JA 47) ("I think you did do this thing"); (JA 49) ("See I know that you did this thing. There's—there's no question in my mind about that."); (JA 52-53) ("I mean obviously you know that you're in trouble right now. There's no question about that, right? . . . . you did—you killed Dixie. I mean that's—that's what you're in trouble over and you know that. There's no question about that."); (JA 54) ("I know that you did this thing"); (JA 58) ("[Y]ou're the guy who killed her. There's no question about that."); (JA 65) ("Well you did it. There's no question that you killed Dixie. Let's get passed [sic] that.").

[19] *See also* (JA 46) ("she's got you in real trouble this time); (JA 47-48) ("I think that she . . . brought the situation on, that she got you into what got to be the biggest trouble she's ever gotten you in before"); (JA 51) ("she's finally got you into more trouble than she can possibly imagine"); (JA 55) ("I have to feel that whatever happened to Dixie, if she's partially responsible for it, you shouldn't take all of the blame for it"); (JA 57) ("she's got you in a hell of a bind. I mean she brought this thing on, she left you there, stuck with this body . . . . She brought this

Petitioner was then "offered legal excuses for his actions in order to obtain an initial admission of guilt." *Miranda*, 384 U.S. at 451. The troopers made excuses for petitioner's conduct, suggested that petitioner acted in self-defense, and posited that the crime was one of passion.[20] They also emphasized that this was petitioner's last chance to avoid a life sentence in favor of a much lighter sentence for negligent homicide or manslaughter. *See, e.g.* (JA 54-56, 68-69).[21]

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thing on. It's her fault. Why should you be forced to live with that"); (JA 63) ("Because of that whatever happened out there happened not because you wanted it to, not because you set out to have it happen, but because she brought it on"); (JA 65) ("That's her final revenge, that's the final time that she screws you. She left you stuck with this fallacious mess that she brought on."); (JA 71) ("if you can be honest about this thing, and finally explain that's what happened, to make us understand the why, in what way Dixie was responsible, in what way she caused this thing to happen"); (JA 72) ("it's her fault. When you get right down to it,I—I think that probably you'll be able to convince me that what happened was entirely her fault"); (JA 73) ("she brought this thing on. And its her fault").

[20] *See, e.g.*, (JA 51) ("I mean I don't know whether she started the thing by grabbing the knife"); (JA 56) (manslaughter would be available if what happened was that "she starts it and she's coming at you and you defend yourself"); (JA 58) (if "it happened so fast that you weren't able to think through the whole result . . . . if that's what happened, then . . . that's not first degree murder . . . . I mean are we talking about heat of passion here and are we talking self-defense, these are the questions which are so important for us to get to now"); (JA 66) (describing scenario and concluding "if that's what happened, if that's the way it went down, then we need to know that, because that's not first degree murder. That's not premeditated"); *see also* (JA 60, 64, 67, 73).

[21] *See, e.g.*, (JA 49) ("[T]his is probably the last chance we'll have to—for you to say something that other people are gonna believe"); (JA 62) ("[W]e've got like a limited reasonable opportunity here, the things—the thing is going down now. This —this is it"); (JA 69) ("[R]ight now is the time when we've got to make the decision of which way we're heading on this thing"); (JA 75) ("I'm giving you an opportunity which I don't see how it'll ever come again"); *see also* (JA 52, 53, 60, 64, 71).

Finally, Trooper Stockard " 'rel[ied] on an oppressive atmosphere of dogged persistence,' " " 'dominat[ing] his subject and overwhelm[ing] him with his inexorable will to obtain the truth.' " *Miranda*, 384 U.S. at 451 (citation omitted). Indeed, at one point, the troopers engaged in a prolonged and psychologically devastating harangue that consumed more than twenty pages of the transcript, during which petitioner uttered no more than ten sentences. (Tr. 60-80) Such "prolonged accusatory questioning is likely to create a coercive environment from which an individual would not feel free to leave." *United States v. Griffin*, 7 F.3d 1512, 1518 (10th Cir. 1993). "An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak." *Miranda*, 484 U.S. at 461.

The "concerns that powered the [*Miranda*] decision" are clearly implicated here: petitioner was subjected to a textbook example of the very pressures that the *Miranda* Court feared would "sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights." *Berkemer*, 468 U.S. at 437. The police attempted to manipulate the circumstances to make the interrogation appear noncustodial (JA 8-9; *see also* JA 16), by telling petitioner that he was not under arrest and would be free to leave no matter what he said (JA 74, 76),[22] while apparently intending to arrest petitioner shortly after the conclusion of the interview. *See* (JA 8-9). The trial court, in weighing the circumstances of this "close" case (JA 9), appeared to conclude that the troopers' statements that petitioner was free to go, although a "devious police tactic" (JA 8), tipped the scales toward a finding that a reasonable person would not have believed himself in "custody" for *Miranda* purposes. (JA 8). What the trial court failed adequately to consider, however, is the fact that, like the court itself, a reasonable person under the circumstances

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[22] *See also* (JA 44-45, 49, 50, 52-53, 61, 76-77, 78-79).

would not have found these statements credible. *See Sumner II*, 455 U.S. at 597 (on habeas review of a mixed question, "the federal court may give different weight to the facts as found by the state court and may reach a different conclusion in light of the legal standard").

A reasonable person would have recognized, when the interview commenced, that he had been summoned to the station on a "pretext." (JA 26) The troopers then began what appeared to be a strictly informational interview in which they asked petitioner about his last encounters with the victim. (Tr. 4-37) While drawing him out in this initial questioning, they gave no evidence that they suspected him of the crime. *Id.* After he spoke freely with them, they then completely changed the nature of the interview, suddenly confronting him with their certainty of his guilt and the strength of their evidence. (Tr. 38-87) Given the troopers' patent dissembling, a reasonable person at this point would have been extremely wary of their assurances, as petitioner evidently was.[23] In short, a reasonable person in petitioner's position would not, despite the troopers' protestations to the contrary, have believed that he was free to leave. *See, e.g., United States v. Lee*, 699 F.2d 466, 467-468 (9th Cir. 1982) (despite police assurances that suspect was free to go, a "reasonable person" would not have felt he was at liberty to leave).[24]

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[23] *See, e.g.*, (JA 74) ("No matter what you ain't gonna arrest me? . . . . What I tell you, you ain't gonna arrest me . . . . Why wouldn't you?"); (JA 76) ("So then you're gonna let me walk out of here?"); (JA 77) ("As long as you let me go take care of my stuff is all I'm asking"); *see also* (JA 50, 53).

[24] As the interrogation wore on, the officer's assurances became less absolute; it became clear that if the officers let petitioner go, it would be only temporary. *See* (JA 61) (troopers told petitioner that he would walk out of the interview but "I can't tell you that this thing is all over when you walk out, you know it's not"); (JA 52-53, 77-78); (Tr. 101). At the conclusion of the interview, the troopers cautioned "don't leave town. You know, don't run." (Tr. 101). They then drove petitioner to a friend's home. (JA 78) The fact that petitioner was eventually allowed to leave the station is certainly not dispositive of what a reasonable person would have believed his situation to be during the course of the interview itself. *See, e.g., State v. Cassell*, 602 P.2d 410, 414-415 & n.11 (Alaska 1979). Moreover, although petitioner was driven to his friend's house, a reasonable person would have been aware that he never truly regained his "freedom of movement." *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). Petitioner's truck—his sole form of transportation—had been seized (JA 78), and the record indicates that the trooper remained in his car outside petitioner's friend's residence while the troopers secured a warrant for petitioner's arrest. *See* (St. 2478). The dictates of *Miranda* cannot be circumvented simply by, as here, allowing a suspect to leave, under police escort and with continuing surveillance, and postponing a formal arrest for a few hours. *Cf. Bruder*, 488 U.S. at 10 n.1 ("We did not announce an absolute rule for all motorist detentions, observing that lower courts must be vigilant that police do not 'delay formally arresting detained motorists' ") (quoting *Berkemer*, 468 U.S. at 440); *Berkemer*, 468 U.S. at 441 (declining to adopt a bright-line rule which "would enable the police to circumvent the constraints on custodial interrogations established by *Miranda*").

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be reversed, and the case should be remanded to that court with instructions to conduct an independent review of the question whether petitioner was in "custody" for *Miranda* purposes or, should the Court resolve that issue, to conduct the appropriate harmless error analysis.

Respectfully submitted,

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APPENDIX

APPENDIX A

28 U.S.C. § 2254

§ 2254. State custody; remedies in State courts

* * * *

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

No. 94-6615

In The

Supreme Court of the United States

October Term, 1994

CARL THOMPSON,

Petitioner,

vs.

PATRICK KEOHANE, Warden, BRUCE M. BOTELHO, Attorney General, State of Alaska,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. In a habeas proceeding brought by a state prisoner, is a state court's determination that a person is not in custody under *Miranda v. Arizona*, 384 U.S. 436 (1966), an issue of fact subject to the presumption of correctness mandated in 28 U.S.C. § 2254(d)?

2. Assuming the presumption of correctness does not apply, does *de novo* review lead to the conclusion that Thompson was not in custody during the interview at the trooper office?

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STATUTORY AND RULE PROVISIONS

28 U.S.C. § 2254(d):

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate indicia, shall be presumed correct[.]

Federal Rule of Civil Procedure 52(a) provides:

> FINDINGS BY THE COURT; JUDGMENT ON PARTIAL FINDINGS (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and

STATUTORY AND RULE PROVISIONS – Continued

> conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

STATEMENT OF THE CASE

On August 11, 1986, Carl K. Thompson stabbed his former wife Dixie Thompson twenty-nine times, killing her. [JA 3, 26] The murder took place at Thompson's home on the outskirts of Fairbanks, Alaska. [JA 3] That same day, Thompson wrapped Dixie's body in a bedspread and tent fly, weighted it down with chains, and dumped it in a gravel pit lake off the Elliott Highway. [JA 3] He threw the murder weapon and Dixie's personal belongings into a public dumpster. [JA 3]

The Alaska State Troopers learned of the murder a month later, on September 10, 1986, when two moose hunters found Dixie's body floating in the gravel pit lake. [JA 3, 10, 26] Because Thompson had disposed of Dixie's personal effects, the troopers did not know the dead woman's identity. [JA 3, 11, 26] The troopers issued a press release describing a unique tattoo on the body – a heart with the name "Carl" on the left chest – and asking the public for assistance in identifying the woman. [JA 4, 11, 26] Thompson's girlfriend urged Thompson to call the troopers, and he did so. [JA 4, 11] Thompson told the troopers that his former wife fit the description of the dead woman, and that he had not seen her since the middle of August when he had taken her to the airport. [JA 4, 11; Transcript of telephone conversation between Thompson and Trooper Barnard on 9/11/86 at 5:11 p.m.] Thompson expressed concern for his former wife's well-being and asked the troopers to call him back as soon as any information became available. [JA 4; Transcript of telephone conversation between Thompson and Trooper Barnard on 9/11/86 at 5:11 p.m.]

Thompson called the troopers again the next day, September 12, inquiring whether there were any developments in the investigation. He talked freely about his relationship with his former wife and expressed his desire to cooperate in the investigation. [JA 4; Transcript of telephone conversation between Thompson and Trooper Barnard on 9/12/86 at 3:15 p.m.]

A dental examination established that the dead woman was in fact Dixie Thompson. [JA 11, 26] By September 15, 1986, the troopers had recovered some of Dixie's belongings. They had also received information which led them to suspect Thompson had killed Dixie. [JA 26] Trooper Chris Stockard telephoned Thompson and asked him to come to the trooper office to identify some jewelry and other items they believed belonged to Dixie. [JA 11, 26] It was undisputed that Trooper Stockard's primary reason for contacting Thompson was to question him about the murder, but Stockard did not relate this to Thompson. [JA 26] Thompson agreed to go to the office, but said he wanted to shower first. [Transcript of telephone conversation between Thompson and Trooper Stockard on 9/15/86 at 10:16 a.m.]

Thompson voluntarily drove to the trooper office in his own vehicle. No trooper accompanied him, even in a separate car. He arrived at approximately 11 a.m. and left his dog in the truck when he went inside. [JA 6, 26, 76] Trooper Stockard and another trooper interviewed Thompson for approximately two hours. [JA 6] The interview was tape recorded. [JA 6] The troopers were dressed in plain clothes, and there were no visible weapons. [JA 6] Trooper Stockard did not advise Thompson of his *Miranda* rights because he did not intend to arrest

Thompson at that time and did not consider Thompson to be in custody. During the questioning, Trooper Stockard repeatedly assured Thompson he was not under arrest, that he was free to leave at any time, and that he would be able to leave at the end of the interview. [JA 6, 27, 44-45, 49-52, 61, 74, 76-77] On several occasions, Thompson asked questions to confirm that he was in fact free to leave. [JA 6, 74, 76]

Thompson initially told the troopers that he knew nothing about Dixie's death. [See JA 49-71] Later in the interview Trooper Stockard confronted him with evidence linking him to the murder. [JA 45, 50-51] Thompson ultimately admitted stabbing Dixie, but he claimed he had acted in self-defense and in the heat of passion. [JA 6-7, 27] At the conclusion of the interview, Thompson was told he was free to go, but that his truck would be impounded and searched. [JA 6] Thompson was given the options of calling a cab, having a friend pick him up, or getting a ride from a trooper; Thompson accepted the offer of a ride and a trooper drove him and his dog home. [JA 6, 78-79] Thompson was arrested two hours later and charged with first-degree murder. [JA 6, 27]

While Trooper Stockard was interviewing Thompson at the trooper office, other troopers were executing a search warrant at Thompson's residence. [JA 11] Scientific testing revealed a large concentration of blood in the kitchen. [JA 11-12] The tread design on the tires of Thompson's truck were similar to tire impressions found at the gravel pit where Thompson had disposed of Dixie's body. [JA 12]

A grand jury in Fairbanks returned a two-count indictment charging Thompson with murder in the first degree in violation of Alaska Statute 11.41.100 and tampering with physical evidence in violation of Alaska Statute 11.56.610. [JA 10] Thompson filed a pretrial motion to suppress his confession on two grounds. First, he asserted that he should have been advised of his *Miranda* rights prior to the interview. Second, he alleged that his statement was not voluntary because the troopers played on his sympathies, minimized his guilt, and placed much of the blame for the homicide on the victim. [JA 5, 17]

The Alaska superior court judge denied the motion to suppress. Applying a reasonable person test to the facts, the trial court found that a reasonable person in Thompson's position would have felt free to leave the trooper office. Accordingly, the court concluded that Thompson was not entitled to *Miranda* warnings because he was not in custody. The court also concluded that the confession was voluntary. [JA 7-8]

Thompson was tried by a jury. The portion of his September 15, 1986, statement in which he admitted stabbing Dixie was played for the jury. [JA 19, 26] The jury found Thompson guilty of first-degree murder and tampering with evidence. [JA 12, 25]

The Alaska Court of Appeals affirmed Thompson's convictions on direct appeal. *Thompson v. State*, 768 P.2d 127 (Alaska App. 1989). [JA 10-23] The appellate court initially noted that Thompson's *Miranda* claim was not

really based on an assertion that he was in custody during the interview, but rather that Trooper Stockard had orchestrated a non-custodial situation in order to avoid having to advise Thompson of his *Miranda* rights. *Id.* at 130-31. [JA 16] In spite of the fact Thompson did not appear to be arguing he was actually in custody for *Miranda* purposes, the court of appeals addressed the issue and found, as did the trial court, that *Miranda* warnings were not required because a reasonable person in Thompson's position would have felt free to leave the trooper office and break off questioning. *Id.* at 131. [JA 16-17][1] The Alaska appellate court also rejected Thompson's claim that his confession was involuntary. *Id.* at 131-32. [JA 19][2]

Thompson sought discretionary review of the suppression issues. The Alaska Supreme Court denied his request. [JA 24]

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[1] It is not clear whether the Alaska appellate court accorded any deference to the trial court's finding that Thompson was not in custody. In later decisions, the Alaska Court of Appeals applied the clearly erroneous standard of review to trial court findings regarding *Miranda* custody. *See Higgins v. State*, 887 P.2d 966, 970 (Alaska App. 1994); *McKillop v. State*, 857 P.2d 358, 361 (Alaska App. 1993).

[2] The trial court imposed a ninety-nine year sentence for the murder and a consecutive five-year sentence for tampering with evidence. [JA 21, 25] On direct appeal, the Alaska Court of Appeals ruled that the five-year sentence for tampering with physical evidence should run concurrently with, not consecutive to, the murder sentence. *Thompson*, 768 P.2d at 133-34. [JA 23] On remand, the trial court imposed a composite sentence of ninety-nine years. [JA 26]

Thompson next filed a petition for writ of habeas corpus in the United States District Court for the District of Alaska, alleging that his confession was not voluntary and had been obtained in violation of *Miranda*. [JA 25] The magistrate judge applied the presumption of correctness contained in 28 U.S.C. § 2254(d) to the Alaska court's finding that Thompson was not in custody during the interview and rejected Thompson's *Miranda* claim. [JA 28-30] The magistrate judge also concluded that the record supported the state court's conclusion that Thompson's confession was voluntary. [JA 30] Based on these findings and conclusions, he recommended that the habeas petition be denied. [JA 31]

Thompson did not timely file objections to the magistrate judge's report and recommendation. On February 18, 1992, the district court judge accepted the magistrate judge's recommendation and dismissed Thompson's habeas petition. [JA 33-34] Thompson then sought leave to file objections. The district court judge vacated the dismissal order and considered Thompson's objections. [JA 35] The judge concluded that the Alaska court's finding that Thompson was not in custody was presumptively correct. After conducting a thorough and independent review of the record, he concluded that the confession was voluntary. The judge denied the habeas petition and, on December 8, 1993, entered judgment against Thompson. [JA 36-38]

Thompson appealed to the Ninth Circuit Court of Appeals. Relying on *Krantz v. Briggs*, 983 F.2d 961, 961-64 (9th Cir. 1993), the court ruled that the state court's determination that Thompson was not in custody was entitled to the presumption of correctness under 28

U.S.C. § 2254(d). [JA 41] Applying the presumption, the court concluded that there was fair support in the record for the Alaska court's finding. [JA 41] After conducting *de novo* review of the record, the court concluded that Thompson's will was not overborne and that his confession was voluntary. [JA 42] Accordingly, the Ninth Circuit affirmed the denial of Thompson's habeas petition. [JA 42]

Thompson filed a petition for certiorari, seeking review of the Ninth Circuit's ruling that the presumption of correctness applies to the state court's determination that he was not in custody for *Miranda* purposes. He did not seek review of the circuit court's ruling that his confession was voluntary. The Court granted the petition and ordered briefing.

SUMMARY OF ARGUMENT

1. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court held that the prosecution may not use statements made during the course of a custodial interrogation unless the prosecution demonstrates that the detained person was advised of and voluntarily waived the right to counsel and to remain silent. A person is in custody for *Miranda* purposes when a reasonable person in the defendant's position would have believed he was under arrest. *Stansbury v. California*, ___ U.S. ___, 114 S.Ct. 1526, 1529 (1994); *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984). In order to apply this objective standard to the totality of

circumstances in a given case, the trial judge must determine what happened during the interrogation. The circumstances surrounding a police interview are generally disputed, so the trial judge must consider evidence and decide what in fact occurred. The trial court, not an appellate court, is in the best position to resolve these factual disputes because the trial judge has the opportunity to view the witnesses' demeanor.

Although the trial court applies a legal test to a set of facts, the issue of *Miranda* custody is not a mixed question of fact and law. Most determinations in a lawsuit involve the application of a legal concept or standard to facts. When the determination of a given issue depends largely on the facts, a reviewing court defers to the trial court's assessment of the facts and limits its review to whether the trial court applied the correct legal standard. Because the issue of *Miranda* custody is intricately interwoven with the facts of a specific case, the trial court's determination that a person is not in custody for *Miranda* purposes is an "issue of fact." As such, the state court's finding is presumed correct under 28 U.S.C. § 2254(d), and a federal court should not overturn that finding unless the state court has applied an erroneous legal standard or the finding is not fairly supported by the record.

2. State court determinations on *Miranda* issues should be accorded deference on collateral review. *Miranda* is a prophylactic rule that results in the suppression of voluntary confessions. A person who voluntarily confesses to the police is not denied a fair trial when the jury

hears his confession. Nor does the admission of the voluntary statement violate the Fifth Amendment's prohibition against compelled statements. Because the state prisoner has not been grievously wronged, the principles of finality, federalism and fairness dictate a deferential standard of review of *Miranda* issues.

3. The choice of the standard of review makes no difference in the result in this case because application of the presumption of correctness and the *de novo* standard lead to the same conclusion – Thompson was not in *Miranda* custody when he was interviewed by the troopers. He agreed to go to the trooper office to discuss the death of his former wife. He drove there in his own vehicle. He was not restrained in any way, he was repeatedly told he was not under arrest and was free to leave, and he went home at the completion of the interview.

ARGUMENT

I. A State Court's Determination That A Person Is Not In Custody For *Miranda* Purposes Is An Issue Of Fact Subject To The Presumption Of Correctness Mandated By 28 U.S.C. § 2254(d)

In 1966, Congress enacted legislation limiting the federal courts' authority to conduct evidentiary hearings and overturn state convictions in habeas corpus proceedings. Congress adopted a "presumption of correctness" which federal courts must apply to state court determinations made after an evidentiary hearing. This presumption of correctness is embodied in 28 U.S.C. § 2254(d), which provides in pertinent part:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate indicia, shall be presumed correct, unless [one or more of eight enumerated circumstances apply].[2]

Congress did not specify which state court determinations are entitled to the presumption of correctness. The Court has held that the presumption of correctness applies to "issues of fact," but not to "issues of law," or to "mixed issues of fact and law." *See Miller v. Fenton*, 474 U.S. 104, 110 (1985). Unfortunately, as the Court has recognized in the habeas context as well as in the direct appeal context, the methodology for distinguishing between fact and law has been "elusive." *Id.* at 113. There is no test to accurately draw the line between questions of fact and conclusions of law. *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) ("Nor do we yet know of any

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[2] The eight circumstances listed in § 2254(d) are: the merits of the factual dispute were not resolved at the state court hearing; the factfinding procedure was inadequate to afford a full and fair hearing; the material facts were not adequately developed; the state court lacked jurisdiction over the subject matter or over the applicant; the applicant was indigent and was deprived of his constitutional right to counsel; the applicant did not receive a full and fair hearing; the applicant was denied due process of law; or the state court factual determination is not fairly supported by the record.

other rule or principle that will unerringly distinguish a factual finding from a legal conclusion."). However, *Miller v. Fenton* provides some guidance:

> Perhaps much of the difficulty in this area stems from the practical truth that the decision to label an issue a "question of law," a "question of fact," or a "mixed question of law and fact" is sometimes as much a matter of allocation as it is of analysis. See Monaghan, Constitutional Fact Review, 85 Columb.L.Rev. 229, 237 (1985). At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question. Where, for example, as with proof of actual malice in First Amendment libel cases, the relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court had been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law. Similarly, on rare occasions in years past the Court has justified independent federal or appellate review as a means of compensating for "perceived shortcomings of the trier of fact by way of bias or other factor. . . . "

In contrast, other considerations often suggest the appropriateness of resolving close questions concerning the status of an issue as one of "law" or "fact" in favor of extending deference to the trial court. When, for example, the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor,

> there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court and according its determinations presumptive weight.

474 U.S. at 113-14 (citations omitted).[3]

The Court has not yet decided whether the determination that a person is not in custody for *Miranda* purposes falls within the ambit of § 2254(d). Of the four circuits that have addressed the issue, the Eighth and Ninth Circuits have held that a state court's custody determination is an "issue of fact" which must be accorded the statutory presumption of correctness: *Feltrop v. Delo*, 46 F.3d 766, 773 (8th Cir. 1995), and *Krantz v. Briggs*, 983 F.2d at 961-64. The Tenth Circuit reviews the custody finding for "clear error," which is the same as presuming the finding to be correct: *Cordoba v. Hanrahan*, 910 F.2d 691, 693 (10th Cir.), *cert. denied*, 498 U.S. 1014 (1990). The Eleventh Circuit has conflicting decisions: *Purvis v. Dugger*, 932 F.2d 1413, 1419 (11th Cir. 1991), *cert. denied*, 503 U.S. 940 (1992), applied the presumption of correctness, while *Jacobs v. Singletary*, 952 F.2d 1282, 1291 (11th Cir. 1992), reviewed the facts *de novo*.

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[3] The Seventh Circuit examines the different functions of trial and appellate judges in determining whether a question is one of law or fact. *Mucha v. King*, 792 F.2d 602, 604 (7th Cir. 1986) ("But one cannot answer the question what is a 'fact' without first considering the purpose of the question. The purpose here is to draw the line between the trial judge's responsibility and our responsibility.").

Application of the principles set forth in *Miller v. Fenton* confirm the Eighth, Ninth and Tenth Circuit's decisions to accord deference to the state court's determination that a person is not in custody under *Miranda*.

A. The Trial Court Is In A Better Position Than An Appellate Court To Make The Custody Determination Because Resolution Of The Issue Involves The Credibility Of Witnesses And The Fact-Specific Application Of The Legal Definition Of Custody

In *Miranda*, the Court held that "[b]y custodial interrogation, we mean questioning initiated by law enforcement officers after a person had been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. Subsequently, the Court clarified that "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (*per curiam*) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)). *See also Stansbury*, 114 S.Ct. at 1528-29; *Berkemer*, 468 U.S. at 440; *Minnesota v Murphy*, 465 U.S. 420, 430-31 (1984). When no formal arrest has occurred, the court applies an objective test: would a reasonable person in the suspect's position have believed that he was under arrest. *Stansbury*, 114 S.Ct. at 1529; *Berkemer*, 468 U.S. at 442 (1984).[4]

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[4] The Alaska trial and appellate courts applied the test for custody adopted by the Alaska Supreme Court in *Hunter v. State*, 590 P.2d 888 (Alaska 1979). *Hunter* adopted an objective test: whether a reasonable person in the suspect's shoes would

Judges in the federal and state courts examine the totality of the circumstances in determining whether a particular suspect is in custody for *Miranda* purposes. *Stansbury*, 114 S.Ct. at 1529. Relevant factors include: the location and physical surroundings of the interview; the language used by the officer to request the interview; whether the person came on his own or was escorted by police officers; the number of officers conducting the interview; the existence of any physical restraint, such as the drawing of weapons or the stationing of a guard at the door of the interview room; whether the person was told he was free to go; the demeanor of the officers; the extent to which the individual is confronted with evidence of guilt; the duration of the interview; the degree of pressure applied to the suspect; and whether the suspect left at the end of the interview. *See United States v. Booth*, 669 F.2d 1231, 1235 (9th Cir. 1981); *People v. Dracon*, 884 P.2d 712, 717 (Colo. 1994); *People v. Foster*, 552 N.E.2d 1112 (Ill. App.), *appeal denied* 555 N.E.2d 380 (Ill. 1990); *Hunter v. State*, 590 P.2d 888, 895 (Alaska 1979); W. LaFave and J. Israel, *Criminal Procedure*, § 6.6, pp. 493, 498-99 (1984).

While these factors and others are relevant, no single factor is determinative. For example, *Miranda* warnings

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feel free to leave or break off questioning and, depending on the location, either leave or ask the police to leave. *Id.* at 895. *See also Long v. State*, 837 P.2d 737, 740 (Alaska App. 1992). Although phrased somewhat differently, the Alaska test is essentially identical to the test articulated by the Court. If anything, the Alaska test is more favorable to defendants. Thompson does not claim that the Alaska courts applied an erroneous standard to the facts.

are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *Mathiason*, 429 U.S. at 495. *See also Stansbury*, 114 S.Ct. at 1530 (fact that the person is a suspect does not trigger *Miranda*); *Murphy*, 465 U.S. at 431 (same); *Beheler*, 463 U.S. at 1124-25 (Beheler not in custody for *Miranda* purposes when he accompanied police to station for 30-minute interview); *Beckwith v. United States*, 425 U.S. 341, 347-48 (1976) (*Miranda* warnings not required for interview in private home even though individual was suspected of wrongdoing). Moreover, some facts are irrelevant. For example, the subjective beliefs of the police officers about whether the individual is in custody are not relevant if they are not communicated to the person being questioned. *Stansbury*, 114 S.Ct. at 1529-30; *Berkemer*, 468 U.S. at 442.

The issue of custody is fact-bound. To evaluate the totality of the circumstances, a trial judge must determine when and where the interview occurred, how the defendant got to the place of questioning, how long the interview lasted, who was present during the interview, what the officers and defendant said and did, how the words were spoken, what the officers were wearing, the presence of any physical restraint, such as handcuffs or drawn weapons, whether the officers had any physical contact with the suspect, such as holding him by the arm, whether a guard was posted near the defendant or the interview room, and whether booking procedures were employed. In order to make these findings, the judge must consider actual evidence, either live testimony of the participants, or documents (as in Thompson's case, where the entire encounter was tape recorded), or both.

The judge must evaluate the demeanor of witnesses and their tone of voice to assess their credibility and decide what in fact happened.

After finding the historical facts, the trial court determines whether the individual was in custody for *Miranda* purposes. Because resolution of the custody issue in any given case involves a fact-specific application of the definition of "custody," the issue "falls somewhere between a pristine legal standard and a simple historical fact." *See Miller v. Fenton*, 474 U.S. at 114. Deference to the trial court's ultimate conclusion regarding the totality of the circumstances is warranted because the conclusion is "based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case." *See Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 289 (1960). The "close relationship of the [standard for custody] to the data of practical human experience, and the multiplicity of relevant factual elements, creating the necessity of ascribing the proper force to each" lead to the conclusion that the trial court's determination is entitled to the presumption of correctness. *Id.* at 289. *See also Purvis*, 932 F.2d at 1419 (presumption of correctness applied to state court's custody finding; "The state trial court was in the unique position, after observing [the defendant] and listening to the evidence presented at trial, to determine whether a reasonable person in [the defendant's] position would have felt free to leave the police station."); *United States v. Humphrey*, 34 F.3d 551, 558-61 (7th Cir. 1994) (Posner, C.J., concurring) (custody determination should be reviewed for clear error).

Treating *Miranda* custody as an issue of fact subject to the presumption of correctness is in accord with the Court's treatment of another *Miranda* issue. In *Murphy*, the Court referred to a trial court's finding that the defendant did not invoke his privilege against self-incrimination as a "factual finding." 465 U.S. at 424 n.3. *See also Bobo v. Kolb*, 969 F.2d 391, 397 (7th Cir. 1992) (determination whether suspect invoked his *Miranda* rights is factual finding subject to presumption of correctness).

California v. Prysock, 453 U.S. 355 (1981) (*per curiam*), further supports respondent's position that deference should be accorded to state court findings on the issue of *Miranda* custody. *Prysock* involved the adequacy of the warnings given. The Court reversed because the California appellate court had applied an erroneous standard. In granting review, the Court stated that "ordinarily this Court would not be inclined to review a case involving application of [*Miranda*] to a particular set of facts." *Id.* at 355. This statement strongly suggests that the Court accords deference to state court rulings on *Miranda* claims when the state court has applied the correct legal test to the facts.

B. The Presumption Of Correctness Applies On Habeas Review To Similar State Court Determinations Involving Fact-Specific Applications Of Legal Principles

Section 2254(d) is designed to serve the interests of federalism and finality by making state court determinations on issues of fact binding on federal courts on habeas review. In accordance with this purpose, the Court has broadly construed the term "issue of fact" to apply to

state court determinations that are based on witness credibility: *Demosthenes v. Baal*, 495 U.S. 731, 735 (1990) (*per curiam*) (state court's determination that inmate on death row was competent to waive his right to seek post-conviction relief entitled to presumption of correctness); *Wainwright v. Witt*, 469 U.S. 412, 429 (1985) (statutory presumption of correctness applies to trial court's determination that prospective juror should be excused for cause); *Patton v. Yount*, 467 U.S. 1025, 1036-37 (1984) (impartiality of individual juror subject to presumption); *Rushen v. Spain*, 464 U.S. 114, 120 (1983) (*per curiam*) (state court findings regarding substance of ex parte communications and their effect on juror impartiality, and whether jury's deliberations as a whole were biased entitled to deference); *Maggio v. Fulford*, 462 U.S. 111 (1983) (*per curiam*) (determination of defendant's competency to stand trial reviewed under § 2254(d)); *Marshall v. Lonberger*, 459 U.S. 422, 431-37 (1983) (statutory presumption applies to findings that defendant received notice of and understood charges to which he entered guilty pleas); *Smith v. Phillips*, 455 U.S. 209, 218 (1982) (a state trial judge's finding that a juror's conduct did not impair his ability to render a fair and impartial verdict is subject to the presumption of correctness).

In *Miller v. Fenton*, the Court left open the question whether the presumption of correctness applies to state court findings regarding the waiver of *Miranda* rights. 474 U.S. at 106. Since then, three circuits have held that a state court's determination that a defendant knowingly and intelligently waived his *Miranda* rights is a question of fact that falls within the ambit of the statutory presumption. *See Washington v. Murray*, 952 F.2d 1472, 1482

(4th Cir. 1991); *Derrick v. Peterson*, 924 F.2d 813, 823 (9th Cir. 1990), *cert. denied*, 502 U.S. 853 (1991); *Perri v. Director, Dept. of Corrections, State of Illinois*, 817 F.2d 448, 451 (7th Cir. 1987). The Seventh Circuit reasoned that the determination involves basic or primary facts which turn on the credibility of witnesses who relate external events:

> Once a state court finds that a defendant understood each *Miranda* right, then the court has made the necessary subsidiary factual determinations to the conclusion that the defendant has made a knowing and intelligent waiver. Therefore, because the final conclusion of whether a waiver was intelligent is disposed of by a state court's ascertainment of subsidiary factual determinations, we conclude that it would be incongruous not to give this determination deference under 28 U.S.C. § 2254(d).

Perri, 817 F.2d at 451. *See also Bryan v. Warden, Indiana State Reformatory*, 820 F.2d 217, 220 (7th Cir.) (voluntariness issue requires determination whether the process was fundamentally fair, but waiver of rights inquiry more discrete and entitled to deference), *cert. denied*, 484 U.S. 867 (1987); *Fike v. James*, 833 F.2d 1503, 1506-07 (11th Cir. 1987) (*per curiam*) (§ 2254(d) applies to determination that the suspect initiated a conversation after an invocation of the right to counsel).

Juror impartiality, the competency of a defendant to stand trial and to waive his right to seek post-conviction relief, the defendant's understanding of the charges against him, and the defendant's understanding of his *Miranda* rights all involve fact-bound disputes. Because the trial judge is in the best position to evaluate the credibility of the witnesses who testify about the factual

disputes, the state court's ultimate determinations on these issues are subject to the requirements of § 2254(d). In the *Miranda* context, the demeanor of the officer and the defendant play an important role in determining what happened before, during and after the interview. The judge's credibility assessments and findings of historical fact go to the heart of the custody determination. The ultimate custody determination in any given case is peculiarly dependent on the facts and is unlikely to establish rules of future conduct. Accordingly, the sound administration of justice favors deference to the trial court's custody determination.[5]

That the custody finding ultimately is determinative of the *Miranda* issue in a given case does not warrant plenary review. As the Court noted in *Miller v. Fenton*:

> Equally clearly, an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question.

474 U.S. at 113 (citation omitted).

C. Fact-Bound Determinations Similar To The Custody Determination Are Accorded Deference By Reviewing Courts On Direct Appeal

A number of matters that involve the application of a legal rule to facts are given only limited review on direct

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[5] That the Alaska trial judge in Thompson's case did not hear live testimony because the interview was recorded does not lead to application of a different standard. In *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985), the Court held that the clearly erroneous standard applied "even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts."

appeal. Rule 52(a) of the Federal Rules of Civil Procedure provides that these fact-bound determinations in a judge-tried case "shall not be set aside unless clearly erroneous." This standard of review is essentially the same as the presumption of correctness contained in § 2254(d).[6] Under these equivalent standards of review, an appellate court accords great deference to the district court or the state court findings and affirms unless there is no fair support in the record for the findings or the findings are

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[6] In his brief, Thompson mistakenly equates the clearly erroneous standard of review with *de novo* review. [Br. of Pet. at 18-19 & n.10] "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). The Court's description of the clearly erroneous standard on direct appeal is similar to the presumption of correctness in habeas cases:

> If the district court's account of the evidence is plausible in light of the record reviewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous.

Anderson v. Bessemer City, 470 U.S. at 573.

Similarly, in habeas cases, the presumption of correctness prohibits a federal court from simply disagreeing with a state court's view of the facts and substituting its own view. Thus, when two conclusions find fair support in the record, the federal court must defer to the state court finding. *Wainwright v. Goode*, 464 U.S. 78, 85 (1983) (*per curiam*). In *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 500 (1984), the Court even used the term "presumption of correctness" when referring to the clearly erroneous standard of Rule 52(a).

predicated on a misunderstanding of the governing rule of law.

In the Fourth Amendment context, the determination whether a person voluntarily consented to a search is based on the totality of the circumstances and is considered a question of fact. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). In the Fourteenth Amendment equal protection context, the trial court's determination whether the prosecutor, in exercising a peremptory challenge, intended to discriminate against a juror because of his race is a question of fact entitled to great deference on appeal. *Hernandez v. New York*, 500 U.S. 352, 365 (1991). As in the habeas context, the district court's conclusions concerning juror impartiality are reviewed for clear error. *Mu'min v. Virginia*, 500 U.S. 415, 428 (1991). *See also Amadeo v. Zant*, 486 U.S. 214, 225 (1988) (in habeas proceeding involving federal prisoner, the district court's conclusion that the prisoner's lawyer did not deliberately bypass an issue at trial is reviewed under the clearly erroneous standard). Appellate courts defer to the trial court's findings on these issues because they are based on the credibility of witnesses.

In voting rights cases, the trial court must determine whether there has been impermissible vote dilution in violation of the Voting Rights Act of 1965, 42 U.S.C. § 1973. Vote dilution, like *Miranda* custody, requires consideration of the totality of the circumstances. Because the circumstances vary depending on the facts of the case, the trial court is in a better position than an appellate court to make the determination. For this reason, the Court held that the clearly erroneous standard required reviewing courts to accord deference to the trial court's

determination. *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986).[7]

In *Anderson v. Bessemer City*, 470 U.S. 564 (1985), the Court explained why a trial court's determination regarding discriminatory intent is presumed correct on direct appeal:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of

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[7] In civil cases, a number of trial court determinations which involve the application of a legal standard to factual findings are subject to Rule 52(a)'s clearly erroneous standard of review: whether a plaintiff has demonstrated a pattern or practice of racial discrimination by a preponderance of the evidence, whether the defendants acted with discriminatory intent, whether an exemption to the Fair Labor Standards Act applies to a particular case, and whether an at-large voting system was being maintained for discriminatory purpose. *Bazemore v. Friday*, 478 U.S. 385, 398 (1986) (*per curiam*); *Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (1982); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 712-13 (1986); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). *See also Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1198 (6th Cir. 1988) ("A district court's ultimate and subsidiary findings concerning causation, negligence, nuisance, trespass, actual damages, and punitive damages, are all factual determinations included within the scope of Rule 52(a)." (footnotes citing cases omitted)); *Mucha v. King*, 792 F.2d 602, 605 (7th Cir. 1986) ("Although possession is a legal concept, whether particular 'facts' show possession is itself a 'fact' for purposes of separating the trial judge's function from our own. Negligence is another such fact. Facts of this sort, which are found by applying a legal standard to a descriptive or historical narrative, are governed by the clearly-erroneous rule."); 9A Wright and Miller § 2589, p. 612-20 (discussing and citing cases that apply the clearly erroneous standard to a number of issues involving fact-specific applications of legal principles).

> credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As has been stated in a different context [the habeas context], the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.' " *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

Id. at 574-75.

The same rationale applies to the *Miranda* custody issue in the habeas context. Duplication of the state trial judge's efforts in federal courts will contribute only negligibly to the accuracy of the determination, at a significant cost in judicial resources. Moreover, it would be too much to require state prosecutors, having persuaded a state trial judge and a number of state appellate judges that a defendant was not in custody for *Miranda* purposes, to persuade anew four federal judges (one district court and three circuit court) that the defendant was not in *Miranda* custody.

D. The Court Has Not Already Implicitly Decided The Question On Direct Review

Thompson argues that the Court has implicitly concluded that *Miranda* custody is subject to *de novo* review. [Br. of Pet. at 20-22] Thompson reaches this conclusion by

construing several decisions by the Court as having conducted independent review of the custody determination. However, an equally valid interpretation of those cases is that the Court determined that the lower courts had applied an erroneous legal standard to the facts. For example, the Court in *Stansbury* concluded that the California Supreme Court had violated the rules for determining whether a person is in *Miranda* custody by considering the officer's subjective belief regarding the person's status as a suspect. The Court did not independently review all of the facts and decide whether the defendant was in custody; it remanded to the California Supreme Court for a proper application of the rules. 114 S.Ct. at 1527-31. In *Illinois v. Perkins*, 496 U.S. 292 (1990), the Court rejected the argument that *Miranda* applies whenever a suspect is incarcerated on another offense and speaks with a person who, unbeknownst to the suspect, is a government agent. The Court did not independently review the totality of the circumstances surrounding the discussion between the suspect and the undercover government agent; rather, the Court determined that the lower court had read *Miranda* too broadly in relying solely on the fact of the suspect's incarceration. 496 U.S. at 297.

Similarly, the *Mathiason* Court held that the Oregon Supreme Court applied the wrong legal standard – whether the interview took place in a "coercive environment" instead of whether the defendant's freedom of movement was restricted to the degree associated with a formal arrest. 429 U.S. at 493. This reading is consistent with Justice Rehnquist's observation regarding *Mathiason* when he granted a stay of the state court judgment in *Fare*

v. Michael C., 439 U.S. 1310 (1978) (Rehnquist, J.): "In our most recent pronouncement [in *Mathiason*] on the scope of *Miranda*, we found the Oregon Supreme Court's expansive definition of 'custodial interrogation' read *Miranda* too broadly"). *Id.* at 1315. *See also Pennsylvania v. Bruder*, 488 U.S. 9, 10 (1988) (*per curiam*) (lower court did not apply legal test set out in *Berkemer*); *Berkemer*, 468 U.S. at 435-36 (deciding whether *Miranda* applies to the brief detention associated with a traffic stop); *Murphy*, 465 U.S. at 431-33 (state court expanded *Miranda* in concluding that *Miranda* warnings were required, not because probationer in custody, but because probation officer could compel probationer to answer questions); *Beckwith*, 425 U.S. at 343-44 (district court applied correct legal standard); *Beheler*, 463 U.S. at 1123-25 (state appellate court applied wrong legal standard).

E. Labeling An Issue A "Mixed Question Of Fact And Law" Does Not Necessarily Lead To *De Novo* Review

Thompson relies on language from *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963), for the proposition that the application of a legal standard to historical facts involves a mixed question of fact and law. He reasons that since the determination whether a person is in custody for *Miranda* purposes involves the application of a legal principle – "custody" – to a set of facts, it must be a mixed question of fact and law. Thompson reads the language in *Townsend v. Sain* too broadly. Application of such a broad reading would render virtually all issues subject to plenary review because resolution of nearly every issue that arises in a criminal or civil action involves the application

of some legal principle or some degree of legal reasoning. More importantly, Thompson's construction is in conflict with decisions the Court rendered after Congress responded to *Townsend v. Sain* and enacted the presumption of correctness.

For example, under Thompson's analysis, the issue of whether an individual juror can be impartial would be characterized as a mixed question of fact and law because it involves the application of a constitutional principle – impartiality – to the facts concerning a particular juror. But in *Patton v. Yount*, the Court held that the issue "is plainly one of historical fact." 467 U.S. at 1036-37. In a footnote, the Court observed:

> There are, of course, factual and legal questions to be considered in deciding whether a juror is qualified. The constitutional standard that a juror is impartial only if he can lay aside his opinion and render a verdict based on the evidence presented in court is a question of federal law, . . . ; whether a juror can in fact do that is a determination to which habeas courts owe special deference. . . .
>
> The dissent misreads the Court's opinion in *Reynolds v. United States*[, 98 U.S. 145, 156 (1879)]. *Reynolds* was decided some 87 years before the presumption of correctness for factual findings was added to 28 U.S.C. § 2254. The Court clearly did not attach the same significance to the phrase "a question of mixed law and fact" that we do today under modern habeas law. It recognized that juror-disqualification questions may raise both a question of law – whether the correct standard was applied –

> and a question of fact. Whether an opinion expressed by a juror was such as to meet the legal standard for disqualification was viewed as a question of fact as to which deference was due to the trial court's determination.

Id. at 1037 n.12.

The Court made a similar observation in *Wainwright v. Witt*, in applying the presumption of correctness to a trial court's decision to excuse a juror for cause because the juror's view on capital punishment would have prevented or substantially impaired the performance of his duty. "The trial judge is of course applying some kind of legal standard to what he sees and hears, but his predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record. These are the 'factual issues' that are subject to § 2254(d)." 469 U.S. at 429.

Similarly, the state judge's application of a constitutional standard of competency to stand trial to a particular defendant is subject to the presumption of correctness. So long as the state trial judge applies the correct legal standard to the subsidiary factual findings, the federal court must defer to the state trial judge's competency determination. *Maggio v. Fulford*, 462 U.S. at 113-117.

Section 2254(d)'s presumption also applies in the Sixth Amendment context. A state court judge deciding whether a defendant's right to counsel is violated when the defendant's statements to a jailhouse informant are admitted at trial must make a number of factual findings concerning what instructions the police gave to the

informant, whether the informant followed those instructions, what the informant said to the defendant, and what the defendant said to the informant. Based on these findings, the judge must then determine whether the defendant's statements were deliberately elicited. Notwithstanding the constitutional right involved, the Court held that the presumption of correctness applies to a state court's finding that police and their jailhouse informant did not deliberately elicit the defendant's incriminating responses. *Kuhlmann v. Wilson*, 477 U.S. 436, 460-61 (1986).

Thompson asserts that seven of the nine circuits that have considered the issue have characterized *Miranda* custody as a mixed question of fact and law, which the circuits review independently. He is mistaken.

The Ninth Circuit is not the only circuit which accords deference to the trial court's custody determination. As noted earlier, the Eighth Circuit and the Tenth Circuit also apply deferential standards of review in the habeas context: *Feltrop*, 46 F.3d at 773 (presumption of correctness); *Cordoba*, 910 F.2d at 693 (clear error).

On direct appeal, the circuits are split. The First, Second, Sixth, Seventh, Eighth, Ninth and Tenth Circuits have applied the deferential clearly erroneous standard of review to the district court's custody determination: *United States v. Lanni*, 951 F.2d 440, 441 (1st Cir. 1991); *United States v. Mitchell*, 966 F.2d 92, 98 (2nd Cir. 1992); *United States v. Mahar*, 801 F.2d 1477, 1500 & n.38 (6th Cir. 1986); *United States v. Levy*, 955 F.2d 1098, 1103 (7th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 102 (1992); *United States v. Griffin*, 922 F.2d 1343, 1347-48 (8th Cir. 1990); *United*

States v. Poole, 806 F.2d 853 (9th Cir. 1986); *United States v. Robertson*, 19 F.3d 1318 (10th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 271 (1994). The D.C. Circuit and the Third, Fifth and Eleventh Circuits have, without analysis, conducted plenary review: *United States v. Baird*, 851 F.2d 376, 379 (D.C. Cir. 1988); *United States v. Calisto*, 838 F.2d 711, 718 (3rd Cir. 1988); *United States v. Harrell*, 894 F.2d 120, 122-25 (5th Cir.), *cert. denied*, 498 U.S. 834 (1990); *United States v. Rioseco*, 845 F.2d 299, 302 (11th Cir. 1988).

Even if *Miranda* claims in general can properly be labeled mixed questions of fact and law, this does not mean that every subsidiary issue is reviewed independently on direct appeal or in the habeas context. The case of *Connecticut v. Barrett*, 479 U.S. 523 (1987), is illustrative. When the defendant was advised of his *Miranda* rights, he indicated that he understood his rights and that he had "no problem" giving an oral statement without an attorney, but he would not give a written one unless an attorney was present. The defendant proceeded to make oral incriminating statements. The Connecticut trial court found that the defendant understood his rights and that he had engaged in a limited invocation of his right to counsel. Based on these findings, the trial court admitted the statements at trial. The Connecticut Supreme Court reversed, ruling as a matter of law that the defendant's limited invocation of his right to counsel prohibited any interrogation.

In reversing Connecticut's highest court, the Court noted that the state court had decided an issue of law, the effect of the limited invocation on the police's ability to continue questioning. The Court did not independently

review the state trial court's subsidiary findings, based on credibility determinations, that the defendant understood his rights and that his invocation of his right to counsel was limited to written statements. 479 U.S. at 527-28 & n.1.

Applying *Barrett* to a claim that a person's rights under *Miranda* were violated when he was interviewed without warnings, leads to the conclusion that a trial court's ruling that the person was not entitled to warnings is a legal issue subject to independent review, while the trial court's subsidiary ruling that the person was not in custody is entitled to deference.

F. Considerations Of *Stare Decisis*, Congressional Intent, And The Nature Of The Inquiry Do Not Warrant Plenary Review

The reasons for holding that the voluntariness of a confession or a plea, the admissibility of a pretrial identification, and whether a defendant received effective assistance of counsel are subject to plenary review – *stare decisis*, congressional intent, and the nature of the inquiry – are not present in the *Miranda* context. The Court's most detailed discussion of the presumption of correctness and *de novo* review in the habeas context appears in *Miller v. Fenton*, which involved the voluntariness of a confession. The Court held that a state court's findings on subsidiary facts, such as the length of the interrogation, the defendant's prior experience with the legal system, and his familiarity with *Miranda* warnings, are entitled to the presumption of correctness. 474 U.S. at 117. The ultimate

voluntariness determination, however, is subject to plenary review. The Court reasoned that considerations of *stare decisis*, congressional intent, and the "uniquely legal dimension" of voluntariness warranted *de novo* review. More specifically, the Court noted that it had treated voluntariness as a legal conclusion for almost fifty years when Congress enacted § 2254(d) in 1966, and that Congress had modeled the habeas statute after *Townsend v. Sain*, which had assumed that the issue of voluntariness was subject to plenary review. *Miller v. Fenton*, 474 U.S. at 116-18. *See also Marshall v. Lonberger*, 459 U.S. at 431-35 (voluntariness of guilty plea reviewed *de novo*, but subsidiary questions of fact, such as whether defendant aware he was pleading to charge of attempted murder, subject to presumption of correctness); *Sumner v. Mata*, 455 U.S. 591, 597 (1982) (*per curiam*) (constitutionality of pretrial identification procedures independently reviewed, but findings of fact including whether the witnesses had an opportunity to observe the crime or were too distracted, whether the witnesses gave an accurate and detailed description, and whether the witnesses were under pressure from others, entitled to presumption); *Strickland v. Washington*, 466 U.S. 668, 697-98 (1984) (ineffective assistance of counsel claim involves mixed question of law and fact because claim "is an attack on the fundamental fairness of the proceedings whose result is being challenged").

The Court has never squarely addressed whether a trial court's determination of *Miranda* custody is entitled to deference on direct appeal or on habeas review; therefore, *stare decisis* has no application. *See Brecht v. Abrahamson*, ___ U.S. ___, 113 S.Ct. 1710, 1718 (1993) (*stare decisis*

does not preclude the Court from adopting less stringent harmless error test on habeas review because Court had never squarely addressed the issue). *See also Edelman v. Jordan*, 415 U.S. 651, 670-671 (1974). *Townsend v. Sain* did not involve a *Miranda* issue, nor did it allude to how *Miranda* issues would be treated. Since the Court decided *Miranda* in 1966, the same year Congress enacted § 2254(d), it can hardly be argued that Congress tacitly approved of plenary review of *Miranda* issues, let alone the custody determination.

The issue of *Miranda* custody does not involve a "uniquely legal dimension." The application of an objective reasonable person test does not transform the essentially factual determination into a legal one. For instance, the issue of negligence involves the application of a reasonable person standard to a particular set of facts and is treated as a question of fact. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990); *McAllister v. United States*, 348 U.S. 19, 20-22 (1954); 9A Wright and Miller, *Federal Practice and Procedure*, § 2590 (2nd ed. 1994).

The legal construct of the reasonable person is no stranger to criminal law. A jury evaluating a defendant's claim he acted in self-defense must decide whether a reasonable person in the defendant's position would have believed deadly force was necessary to avoid death or serious bodily harm. *See* W. LaFave and A. Scott, *Substantive Criminal Law*, § 5.7 (1986). Similarly, a defendant claiming he acted in the heat of passion must demonstrate that a reasonable person in his position would have acted as he did. *Id.* at § 7.10. Two of the common culpable mental states – recklessness and criminal negligence –

measure the accused's conduct against a reasonable person standard. *Id.* at § 3.7. Resolution of all of these issues involve the application a legal principle to the facts, and all are factual issues decided by the jury.

The concept of *Miranda* custody is not integral to due process. Voluntariness, pretrial identifications, and effective representation involve a "complex of values" which are not present in the *Miranda* context. *Miranda* is not rooted in fundamental fairness or due process. Nor did *Miranda* create rights in addition to those afforded by the Fifth Amendment. As the Court stated in *Michigan v. Tucker*, 417 U.S. 433 (1974):

> The Court recognized that these procedural safeguards [*Miranda* warnings] were not themselves rights protected by the Constitution, but were instead measures to insure that the right against compulsory incrimination was protected.

Id. at 444. *See also Roberts v. United States*, 445 U.S. 552, 560 (1980).

Since *Miranda* custody is not a standard expressly mandated by the Constitution, there are no compelling reasons to review the custody determination *de novo*. *Cf. Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989) (whether evidence is sufficient to support a finding of actual malice in a defamation case is a question of law because of the unique character of the First Amendment interest protected by the standard); *Bose Corp.*, 466 U.S. at 508 n.27 ("The simple fact is that First Amendment questions of 'constitutional fact' compel the Court's *de novo* review." (citations omitted)).

G. Principles Of Finality, Federalism And Fairness Dictate Application Of The Presumption Of Correctness To *Miranda* Custody Determinations

It must be remembered that the issue presented arises in the habeas context, not on direct appeal. States' interests in finality take on more significance in a collateral attack.

> When the process of direct review – which, if a federal question is involved, includes the right to petition for a writ of certiorari – comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of the federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums to relitigate state trials.

Barefoot v. Estelle, 463 U.S. 880, 887 (1983). *See also Engle v. Isaac*, 456 U.S. 107, 128 (1982) ("Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.").

Miranda is a prophy' ctic rule that requires suppression of voluntary confessions in the government's case-in-chief. *Miranda*, 384 U.S. at 467; *Fare v. Michael C.*, 442 U.S. 707, 718 (1979); *Tucker*, 417 U.S. at 444; *New York v. Quarles*, 467 U.S. 649, 654 (1984). "The *Miranda* exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation." *Oregon v. Elstad*, 470 U.S. 298, 306-07 (1985).

There are valid policy considerations for treating prophylactic rules like *Miranda* differently on collateral review than on direct appeal. *Duckworth v. Eagan*, 492 U.S. 195, 212 (1989) (O'Connor, J., concurring). Habeas corpus should be used to correct wrongs of constitutional dimension, not wrongs of lesser magnitude or violations of prophylactic rules. *Phillips*, 455 U.S. at 221; *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (purpose of habeas corpus is "to guard against extreme malfunctions in the state criminal justice systems") (Stevens, J., concurring in judgment).

State courts are fully qualified to apply the legal definition of custody. In fact, they have the superior vantage point because the trial judge can listen to the testimony regarding the various factual disputes and decide which witnesses to credit. Thompson has put forth no affirmative evidence that state-court judges are ignoring their oaths to uphold the Constitution and are misapplying *Miranda*. If anything, the *Miranda* cases the Court has decided in the last two decades indicate that state appellate judges are more likely to err on the side of requiring *Miranda* warnings where none are needed. Since 1969, the Court has overturned a number of state court decisions which erroneously required *Miranda* warnings, but has not reversed a state court which held that warnings were not required: *Stansbury*, 114 S.Ct. at 1531; *Perkins*, 496 U.S. at 297-98; *Bruder*, 488 U.S. at 10-12; *Mathiason*, 429 U.S. at 493; *Murphy*, 465 U.S. at 440; *Beheler*, 463 U.S. at 1126.

Treating *Miranda* custody as an issue of fact does not completely insulate the state court's determination. A reviewing court can overturn the custody finding when

the trial court has applied an erroneous legal standard. *Townsend v. Sain*, 372 U.S. at 315 n.10 (new trial may be ordered when trial judge applies erroneous standard of law in arriving at factual findings). So too, a reviewing court can overturn a custody finding when the trial court has applied the correct legal standard, but there are no facts in the record to support the trial court's conclusion. In habeas proceedings brought by state prisoners, a federal court can overturn a state court finding when it finds any one of the eight exemptions to the presumption of correctness listed in § 2254(d). *See* note 2, *supra*, p. 10.

The likelihood that an erroneous application of the custody standard to a particular set of circumstances will result in the admission of an involuntary and unreliable confession is virtually non-existent. A state prisoner can allege not only a violation of *Miranda*, but a due process claim that his confession was involuntary. *Withrow v. Williams*, ___ U.S. ___, 113 S.Ct. 1745, 1753 (1993). If the prisoner prevails on the due process claim, he will be entitled to relief. And, as noted earlier, the question whether the confession was voluntary will be reviewed *de novo*. *Miller v. Fenton*, 474 U.S. at 116-17. If, after independent review, the statement is found to be voluntary, no greater degree of reliability will be accomplished by subjecting the *Miranda* custody issue to *de novo* review as well.

Five courts – the Alaska Superior Court, the Alaska Court of Appeals, the Alaska Supreme Court, the United States District Court for the District of Alaska, and the Ninth Circuit Court of Appeals – have conducted an independent review of the record and have determined that Thompson's confession was voluntary. Thompson

has now abandoned the claim. The Alaska jury which found Thompson guilty did so on the basis of reliable evidence. Deference to the state court's finding that Thompson was not in *Miranda* custody could not have conceivably resulted in a grievous wrong. Because "*Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm," ordering a new trial in Thompson's case would vindicate no constitutional right. *Elstad*, 470 U.S. at 306-07. It would simply be an unjustified windfall.

II. Application Of The *De Novo* Standard Of Review Leads To The Conclusion That Thompson Was Not In Custody For *Miranda* Purposes When He Was Interviewed At The Trooper Office

Should the Court conclude that the Ninth Circuit erred in applying the presumption of correctness to the state court's finding that Thompson was not in custody for *Miranda* purposes, the case should be remanded to the Ninth Circuit for application of the *de novo* standard of review. However, the Court may wish to review the custody issue *de novo* and avoid deciding what standard of review applies because, even under the plenary standard of review, there is no doubt that Thompson was not in custody for *Miranda* purposes when he went to the trooper office.

The scenario in this case is virtually identical to those in *Beheler*, 463 U.S. 1121, and *Mathiason*, 429 U.S. 492. Beheler summoned the police to the scene of a shooting and told them his companion had killed the victim. Beheler agreed to accompany the police to the station to

discuss the murder, and he was specifically told he was not under arrest. The police did not administer the *Miranda* warnings. Beheler spoke with the police for approximately 30 minutes, during which time he was told that the prosecutor would be informed of his statement. Beheler then went home; he was arrested five days later. The California appellate court concluded that Beheler had been in *Miranda* custody because the interview occurred in the police station, the police had identified Beheler as a suspect, and the interview was designed to produce incriminating responses. However, the Court framed the question in *Beheler* as follows:

> The question presented in this petition for certiorari is whether *Miranda* warnings are required if the suspect is not placed under arrest, voluntarily comes to the police station, and is allowed to leave unhindered after a brief police interview.

463 U.S. at 1121. The Court went on to answer the question in the negative. *Id.* at 1124.

Mathiason, like Beheler, went to the police station in response to an officer's request. The police told Mathiason they believed he had burglarized a home, and they falsely told him his fingerprints were found at the scene. Mathiason then confessed to the burglary. The Oregon Supreme Court concluded Mathiason was in custody because the interrogation took place in a "coercive environment" and because the police lied about finding Mathiason's fingerprints. In reversing the state court, the Court focused not on the environment, but on the fact that Mathiason was not deprived of his freedom of action in any significant way. *Mathiason*, 429 U.S. at 493.

Thompson, like Beheler and Mathiason, was not placed under arrest prior to or during the interview. Thompson voluntarily appeared at the police station in response to a trooper's request. [JA 17] This was consistent with the prior two contacts he initiated with the troopers in which he expressed a desire to cooperate in the murder investigation. [JA 4, 11; Transcripts of telephone conversations between Thompson and Trooper Barnard on 9/11/86 at 5:11 p.m. and on 9/12/86 at 3:15 p.m.] Thompson did not feel compelled to immediately appear at the trooper office; he told the trooper that he was going to shower first. [Transcript of telephone conversation between Thompson and Trooper Stockard on 9/15/86 at 10:16 a.m.] Thompson drove his own vehicle, and he brought his dog with him. [JA 6, 26, 43, 78] At the end of the interview, he was given the option of calling a friend, calling a cab, or getting a ride from a trooper. Thompson accepted the trooper's offer and left the office unhindered. [JA 6, 78-79]

Thompson contends that there was a "coercive custodial environment" because the interview took place at the trooper office and the troopers used techniques designed to elicit incriminating responses. But these are the same factors the California and Oregon courts relied on in *Beheler* and *Mathiason*, which the Court found did not render Beheler in custody. As the Court recognized in *Mathiason*, "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that a police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime." 429 U.S. at 495. *See also Murphy*, 465 U.S. at 430-31 (probationer who reported to

probation officer at officer's direction was not in *Miranda* custody).

Miranda was concerned about custodial situations which convey the message that the person has no choice but to confess. 384 U.S. at 456-57. "[T]he coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained." *Murphy*, 465 U.S. at 433. Thompson was interviewed by two troopers dressed in plain clothes with no visible weapons. [JA 6] Thompson was repeatedly told he could leave at any time. [JA 6, 27, 44-45, 49-52, 61, 74, 76-77]

That Trooper Stockard related to Thompson his belief that Thompson had murdered Dixie does not transform a non-custodial interview into a custodial one. "Even a clear statement from an officer that the person is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest." *Stansbury*, 114 S.Ct. at 1530. Because Trooper Stockard repeatedly told Thompson he was free to leave, a reasonable person in Thompson's shoes would have felt free to leave the trooper office despite Trooper Stockard's speculation about how he thought the murder had been committed. [JA 49-52, 61, 74, 76-77] Indeed, Thompson left the trooper office even after confessing to brutally stabbing Dixie. [JA 6, 78-79]

The fact that the trooper did most of the talking for a segment of the interview does not indicate custody. Thompson called the troopers on September 12, 1986, to find out how the investigation was coming along. [JA 4; Transcript of telephone conversation between Thompson

and Trooper Barnard on 9/12/86 at 3:15 p.m.]. His minimal responses during a portion of the interview are indicative of a desire to listen to find out how much the troopers knew about the murder and whether they were accepting his story about taking his former wife to the airport.

Trooper Stockard used techniques designed to elicit incriminating responses. But these do not give rise to custody, for "ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concerns." *Perkins*, 496 U.S. at 297. *See United States v. Collins*, 972 F.2d 1385, 1405-06 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1812 (1993) (rejecting claim that statements of FBI agents that the defendants were not under arrest and free to leave were "meaningless" in light of the fact the agents confronted the defendants with incriminating evidence; "Thus, while it may be true, as [one of the defendants] argues, that being confronted with adverse evidence or being told that one could be charged with a crime is 'designed to p[sy]c[h]ologically overcome [the interviewee's] ability to gather his thoughts and intelligently determine the circumstances,' does not transform the interview into a custodial situation.").

The fact that the troopers impounded Thompson's truck at the end of the interview and the fact that a trooper kept Thompson under surveillance during the two hours between the time he left the trooper office and his arrest do not warrant a conclusion that he was in custody for *Miranda* purposes during the interview. The troopers gave Thompson several options for transportation from the office, and he chose to have a trooper drive

him home. Accepting a ride from a police officer instead of calling a friend or cab was Thompson's choice. That choice did not render him in custody.

Thompson appears to be confusing the question of whether a reasonable person in Thompson's shoes would have believed he would be arrested at some point in the future with whether a reasonable person would have believed he was free to terminate the interview with Trooper Stockard. That a reasonable person, confronted by Trooper Stockard's recitation of the evidence against Thompson, would believe that some day he would be arrested and charged does not mean Thompson was entitled to *Miranda* warnings prior to the recitation.

Circuit courts of appeal have concluded that defendants in similar situations are not in custody for *Miranda* purposes. *See United States v. Fazio*, 914 F.2d 950, 955-56 (7th Cir. 1990) (applying *de novo* standard: defendant who voluntarily agreed to speak with police at the municipal building, who drove his own vehicle to the interview, who was never handcuffed and who never had a gun drawn on him, and who was told he was not under arrest and was free to leave at any time was not in custody); *Purvis*, 932 F.2d at 1419 (applying presumption of correctness to state court findings; defendant not in custody where he voluntarily went to police station and there were no physical restraints).

The Alaska court's determination that Thompson was not in *Miranda* custody was correct under both deferential and plenary review.

CONCLUSION

The Ninth Circuit Court of Appeals correctly applied the presumption of correctness to the Alaska court's determination that Thompson was not in custody for *Miranda* purposes. Therefore, the judgment of the Ninth Circuit should be affirmed. Alternatively, the petition for certiorari should be dismissed because Thompson was not in custody under any standard of review.

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(8)

No. 94-6615

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Petitioner,

v.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

1. The principal issue for decision in this case is whether the inquiry into "custody" for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966), is a factual, legal or mixed question because, as respondents recognize, the presumption of correctness embodied in 28 U.S.C. § 2254(d) "applies to 'issues of fact,' but not to 'issues of law,' or to 'mixed issues of fact and law.'" (Resp. Br. 10 (citing *Miller v. Fenton*, 474 U.S. 104 (1985)). Petitioner and respondents appear to concur on

the following points important to the determination of this ultimate issue: that the historical circumstances surrounding the interrogation—the content and context of the interview—are factual issues subject to section 2254(d)'s presumption of correctness on habeas review (*see* Pet. Br. 6, 16, 35; Resp. Br. 30-31); that the *Miranda* "custody" issue turns not on the subjective understandings of the suspect or the interrogating officers, but rather on whether, in light of all the relevant circumstances, a "reasonable person" would have understood that he or she was under arrest or that his or her freedom of movement was restrained to a degree associated with an arrest (*see* Pet. Br. 6, 15-16, 25-26; Resp. Br. 7-8, 13-15); that a court, in making this determination, is applying an objective legal test to the facts of the case (*see* Pet. Br. 6-7, 16-18; Resp. Br. 8, 13, 16); and that, should this exercise be deemed a "mixed" question of law and fact, it is not subject to the section 2254(d) presumption of correctness (Pet. Br. 8-10; Resp. Br. 10). Where petitioner and respondents part company is in isolating the applicable principles for distinguishing factual issues from mixed questions of law and fact.

2. Respondents' proposal for distinguishing between factual and mixed questions is less a standard than a means of eliminating the distinction entirely. Relying upon a civil tax case decided in 1960, respondents apparently contend that where a court is called upon to apply a legal standard to the totality of the circumstances, invoking the " 'fact-finding tribunal's experience with the mainsprings of human conduct,' " the matter should be treated as a factual issue subject to section 2254(d)'s presumption. (Pet. Br. 16 (quoting *Comm'r of Internal Revenue v. Duberstein*, 363 U.S. 278, 289 (1960)). Respondents appear to be arguing that where the determination of a legal issue is "fact-bound" (Resp. Br. 15, 19, 20, 21) or "intricately interwoven with the facts of a specific case" (Resp. Br. 8), that is, where

the ultimate determination "in any given case is peculiarly dependent on the facts" (Resp. Br. 20) and involves a "fact-specific application" of the legal standard (Resp. Br. 16), the issue should be treated as one of fact. The difficulty with this argument is that because each and every mixed question, by definition, "require[s] the application of a legal standard to the historical-fact determinations," *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963), or, put another way, the determination of "whether the rule of law as applied to the established facts is or is not violated," *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982), each such question is necessarily "fact-bound" and "fact-specific." Respondents' proposal functionally to erase the long-recognized distinction between historical-fact inquiries and the application of federal standards to those facts finds no support in the Court's precedents, and indeed is fundamentally at odds with them.

For example, the legal question of the voluntariness of a confession for due process purposes requires for its resolution the evaluation of myriad factual circumstances and is easily as "fact-bound" as the *Miranda* "custody" determination. *See, e.g., Withrow v. Williams*, —— U.S. ——, 113 S.Ct. 1745, 1751 (1993) ("we continue to employ the totality-of-circumstances approach when addressing" a due process voluntariness claim); *Arizona v. Fulminante*, 499 U.S. 279, 285-288 & n.2 (1991) (applying totality of the circumstances test); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) ("[i]n determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. . . . [E]ach [such case] reflected a careful scrutiny of all the surrounding circumstances"). Nevertheless, the *Miller* Court ruled *not* that the trial court's "fact-bound" determination was subject to deference, but rather that the voluntariness inquiry is a " 'mixed ques-

tio[n] of fact and law' subject to plenary federal review." *Miller*, 474 U.S. at 112 (alteration in original) (quoting *Townsend*, 372 U.S. at 309).

Similarly, in setting forth the standard for constitutional ineffective assistance of counsel, this Court declined to provide bright-line rules, *Strickland v. Washington*, 466 U.S. 668, 688 (1984), instructing instead that "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *see also id.* at 688 (in each particular case "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances"); *id.* at 695 (in assessing the "prejudice" prong of an ineffective assistance claim, courts "must consider the totality of the evidence before the judge or jury"). Despite the fact that both the performance and the prejudice prongs of a *Strickland* ineffective assistance claim must be deemed "intricately interwoven with the facts of a specific case" (Resp. Br. 8), this Court has refused to characterize them as questions of " 'basic, primary, or historical fac[t],' " and instead has ruled that they are mixed questions of fact and law not subject to section 2254(d)'s presumption of correctness. *Strickland*, 466 U.S. at 698 (quoting *Townsend*, 372 U.S. at 309 n.6); *see also Kimmelman v. Morrison*, 477 U.S. 365, 388-389 (1986).

A claim that identification evidence was admitted against a defendant in violation of his or her due process rights also "turns upon the facts," *Neil v. Biggers*, 409 U.S. 188, 193 (1972), and "must be determined 'on the totality of the circumstances.' " *Id.* at 196; *see also Manson v. Brathwaite*, 432 U.S. 98, 114-117 (1977) (outlining a number of factual circumstances to be considered in determining whether identification testimony is unreliable under the circumstances of the case). Yet the Court has determined that the ultimate question of the

necessarily "fact-specific application" (Resp. Br. 16) of the due process standard to the facts as found is a "mixed question of law and fact that is not governed by § 2254(d)." *Sumner v. Mata*, 455 U.S. 591, 597 (1982) (*per curiam*) ("*Sumner II*"); *see also Manson*, 432 U.S. at 114-117; *Neil*, 409 U.S. at 193 n.3.

Finally, a question regarding whether a valid waiver has been made in any given case must be viewed as "peculiarly dependent on the facts" (Resp. Br. 20). The Court, however, has ruled that the application of the federal standard for determining the validity of a defendant's waiver of his or her Sixth Amendment right to counsel is not a question of fact but rather is a matter of federal law, and has reviewed the application of that standard *de novo*. *See Brewer v. Williams*, 430 U.S. 387, 403-406 (1977). The question whether a defendant's guilty plea is voluntary, and thus whether he or she truly has made an effective waiver of numerous federal rights, has also been held to constitute a question of federal law as to which the Court has exercised plenary review, not a question of fact subject to section 2254(d)'s presumption. *See Marshall v. Lonberger*, 459 U.S. 422, 431, 436-438 (1983); *see also Parke v. Raley*, —— U.S. ——, 113 S.Ct. 517, 526-527 (1992); *Brookhart v. Janis*, 384 U.S. 1, 4 & n.4 (1966) (the question whether petitioner waived his Sixth Amendment confrontation right "is, of course, a federal question controlled by federal law" as to which "we are duty bound to make an independent examination of the evidence in the record").

3. Respondents' invitation to erase the distinction between factual issues and mixed questions not only is insupportable under this Court's precedents, it is also unnecessary and unwise. As detailed in petitioner's opening brief (Pet. Br. 10-24), the Court's traditional *Townsend* approach, supplemented by *Miller*'s consideration in close cases of whether one judicial actor is better positioned

than another to decide the issue in question, provides a construct that is both workable and consistent with the "sound administration of justice." *Miller*, 474 U.S. at 114. Respondents' attempts to escape the conclusion compelled by the Court's traditional and functional analyses—that the *Miranda* "custody" question is a mixed question of law and fact—cannot withstand scrutiny.

4. The analytical starting point must be the general distinction that was articulated in *Townsend*, that was presumptively incorporated by Congress in the 1966 amendment that added section 2254(d) (*see* Pet. Br. 13-14 n.8), and that has been employed by this Court in a progression of post-1966 habeas cases. Section 2254(d)'s presumption applies to "basic, primary, or historical facts" " 'in the sense of a recital of external events and the credibility of their narrators,' " *Townsend*, 372 U.S. at 309 n.6 (quoting *Brown v. Allen*, 344 U.S. 443, 506 (1953) (opinion of Frankfurter, J.)), but not to "[s]o-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations," *Townsend*, 372 U.S. at 309 n.6. *See, e.g., Miller*, 474 U.S. at 111-112; *Strickland*, 466 U.S. at 698; *Cuyler v. Sullivan*, 446 U.S. 335, 341-342 (1980); *Brewer*, 430 U.S. at 403-404; (Pet. Br. 12-13). Given petitioner's acknowledgement that the historical circumstances surrounding the interrogation are factual findings subject to section 2254(d)'s presumption (Pet. Br. 6, 16, 35), both parties' agreement as to the applicable legal standard (Pet. Br. 15-16, 25-27; Resp. Br. 13-16), and respondents' concession that the *Miranda* "custody" determination involves the application of an objective legal standard to the facts (Resp. Br. 7-8, 13), the "custody" inquiry is a mixed question of law and fact: "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the . . . standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard*, 456 U.S.

at 289 n.19; *see also Brewer*, 430 U.S. at 403-404; *Townsend*, 372 U.S. at 309 n.6.

5. As was explained in petitioner's opening brief (Pet. Br. 16, 33-35), the Court has treated as questions of fact the issues of competency and juror bias which, although essentially questions of historical fact, nominally involve the application of a legal standard. *See Wainwright v. Witt*, 469 U.S. 412, 426-429 (1985); *Patton v. Yount*, 467 U.S. 1025, 1036-1039 & nn. 12, 14 (1984); *Rushen v. Spain*, 464 U.S. 114, 120 (1983) (*per curiam*); *Maggio v. Fulford*, 462 U.S. 111, 113, 117-118 (1983) (*per curiam*). Respondents' attempts to portray these cases as altering the Court's general standards with respect to mixed questions (Resp. Br. 27-28), cannot be reconciled with the Court's precedents. *See supra*, page 6; (Pet. Br. 12-13, 23-24). *Miller* makes clear that the "case-specific holdings" of *Witt, Patton, Rushen and Maggio* (*Miller* 474 U.S. at 112-113), did not, as respondents imply (Resp. Br. 27), tacitly overrule prior precedents, *see Miller*, 474 U.S. at 113, or supplant the Court's traditional analysis discussed above. Rather, the issues of competency and juror impartiality represent the "close questions" (*id.* at 114), at the very edge of the fact/law spectrum, and the Court's supplemental functional analysis dictates that these essentially factual inquiries be treated as questions of fact. *See id.* at 114-115, 116-117.

6. The competency and juror bias issues are in the nature of factual issues better left to trial court determination in three fundamental respects: the "application" of the relevant legal standards constitutes little more than the ascertainment of historical facts relating to a particular actor's state of mind; these factual issues require for their resolution trial judges' particular expertise in assessing witness credibility; and the finding of these facts does not have precedential significance in further defining the meaning of the applicable legal standard. *See, e.g., Witt*,

469 U.S. at 428-429 (in excluding prospective jurors for possible bias, "[t]he trial judge is of course applying some kind of legal standard to what he sees and hears, but his predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record." Findings regarding a venireman's "state of mind" are "based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province."); *Patton*, 467 U.S. at 1036-1038 & nn. 12, 14 (application of the constitutional standard for juror impartiality, whether a juror "can lay aside his opinion and render a verdict based on the evidence presented," mirrors an issue of historical fact: "did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed"; this determination "is essentially one of credibility, and therefore largely one of demeanor," to which reviewing courts should defer); *Rushen*, 464 U.S. at 120, 121-122 n.6 (the trial court is better positioned to make credibility determinations necessary to determine historical facts regarding the "substance of the [juror's] *ex parte* communications" and "their effect on juror impartiality"); *Maggio*, 462 U.S. at 113, 116-118 (habeas court is not at liberty to substitute its own judgment as to the credibility of witnesses upon which the determination of defendant's competency to stand trial is based).[1]

[1] Although the determination of issues of intent may require the application of legal rules governing the allocation of burdens and ordering of presentation of proof, and thus may arguably be termed "mixed" issues, the ultimate question generally is one of simple historical fact regarding an actor's actual state of mind. *See, e.g., United States Postal Service Bd. of Govs. v. Aikens*, 460 U.S. 711, 713-716 (1983); *Pullman-Standard v. Swint*, 456 U.S. 273, 285-290 (1982). As the Court has recognized, therefore, it is best classified as a pure question of fact. *See, e.g., id.* at 286-290 (discriminatory intent requires a finding of "actual motive" and is, although an "ultimate" fact, a pure question of fact, not a legal or mixed question); *Hernandez v. New York*, 500 U.S. 352, 364-367 (1991) (plurality opinion) (whether a prosecutor intended to discriminate in excluding possible jurors is a question of fact; "[t]he credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review").

No amount of stretching (Resp. Br. 20-24, 26-29) can make the functional rationale underlying the Court's treatment of competency and juror bias issues cover the *Miranda* "custody" inquiry.

a. First, respondents acknowledge that the determinative "custody" inquiry is what a "reasonable person" would have believed his or her position to be under the circumstances (*see* Resp. Br. 7, 33), and do not attempt to argue that the trial judge will be able to divine a fictitious person's state of mind. The "custody" standard therefore does not merely echo an essentially factual question, as the ultimate issue of what a reasonable person would have believed in the circumstances is an inherently legal inquiry not susceptible to historical determination. *See* (Pet. Br. 16-18).

b. Second, as respondents evidently concede (*see* Resp. Br. 17-18, 22), it is principally the fact that trial courts are better positioned to make, and more experienced in making, assessments of witness veracity and demeanor that requires that deference be accorded those virtually determinative assessments in the juror bias and competency cases. *See supra*, pages 7-8; *Miller*, 474 U.S. at 114 ("When, for example, the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court and according its determinations presumptive weight. *Patton v. Yount* . . . and *Wainwright v. Witt* . . . are illustrative.").

Respondents argue, and petitioner agrees, that "[i]n the *Miranda* context, the demeanor of the officer and the defendant play an important role in determining what

happened before, during and after the interview." (Resp. Br. 20). The concerns underlying section 2254(d) and the Court's traditional deference to findings that reflect assessments of credibility therefore dictate that the presumption of correctness be applied to the finding of these foundation facts. (Pet. Br. 35). The important point, however, is that *unlike* the competency and juror bias cases, the ultimate *Miranda* "custody" determination is not, and indeed under the Court's "reasonable person" analysis cannot be, a product of credibility determinations. *Cf. Miller*, 474 U.S. at 116-117 ("unlike the impartiality of a given juror, *Patton v. Yount* . . ., or competency to stand trial, *Maggio v. Fulford* . . ., assessments of credibility and demeanor are not crucial to the proper resolution of the ultimate issue of 'voluntariness' "). Rather, a "custody" ruling reflects an objective judgment about the legal significance of the accepted, demeanor-dependent facts.[2]

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[2] Because credibility assessments clearly are not "crucial" to the ultimate question of *Miranda* "custody," *Miller*, 474 U.S. at 116-117, the Court has had no difficulty deciding *de novo* the "custody" questions in its cases based on the record facts. Contrary to respondents' suggestion (Resp. Br. 24-26), the Court has exercised plenary review over the *Miranda* "custody" issue, and has not merely corrected lower courts' use of erroneous legal standards. (Resp. Br. 24-26). Perhaps the clearest example is *Berkemer v. McCarty*, 468 U.S. 420 (1984), in which the Court addressed and decided the "custody" question relating to the respondent's pre-arrest statements even though *no* legal standard had been applied to the question below because the lower courts had not reached it. (Pet. Br. 21 & n.12). Most frequently the Court, rather than correcting the lower court's "erroneous legal standard" (Resp. Br. 25) and remanding for further "factfinding" under the proper standard, as would be appropriate if *Miranda* "custody" were indeed a question of fact, has instead independently applied the legal standard to the facts and decided the "custody" issue *de novo*, *see, e.g., California v. Beheler*, 463 U.S. 1121, 1122-1126 (1983) (*per curiam*); *Oregon v. Mathiason*, 429 U.S. 492, 495-496 (1977), sometimes without even setting forth the legal standard applied below or the lower court's reasoning, *see, e.g., Pennsylvania v. Bruder*, 488 U.S. 9, 10-11 (1988) (*per curiam*); *Orozco v. Texas*, 394 U.S. 324, 326-327 (1969); *Mathis v. United States*, 391 U.S. 1, 3-5 (1968).

In such circumstances, the Court's precedents make clear that reviewing courts must presume the correctness of the demeanor-dependent facts but independently evaluate the significance of those facts under prevailing federal legal standards. For example, credibility questions may be central in determining the reasons behind a lawyer's failure to take certain steps in representing a criminal defendant for purposes of an ineffective assistance of counsel claim, the actual events surrounding the inducement of a plea of guilty for purposes of a challenge to the voluntariness of the plea, the circumstances underlying a challenged lineup for purposes of contesting the reliability of identification evidence, the factual context underlying a claim of multiple representation, or the facts pertinent to a claim that a defendant was coerced into waiving his Sixth Amendment right to counsel. Credibility questions are also often critical in settling the context of a due process challenge to the voluntariness of a confession, where the legal standard—whether the confession was in fact the product of a "free and rational will" (*Miller*, 474 U.S. at 110)—relies to an extent on a determination of actual state of mind. Accordingly, this Court has, in each of the above-described contexts, deferred to the trial court's finding of the "historical" foundation facts, but has mandated plenary federal review of the ultimate mixed question presented. *See, e.g., Strickland*, 466 U.S. at 698; *Marshall*, 459 U.S. at 431-432, 436-438; *Sumner II*, 455 U.S. at 597; *Cuyler*, 446 U.S. at 341-342; *Brewer*, 430 U.S. at 397 n.4, 403-404.

c. Finally, the issues of competency and juror bias essentially turn on the determination of a single historically ascertainable fact concerning the state of mind of a particular actor, and the resolution of those issues in a particular case generally will not result in the elaboration of the basic legal standard applied or provide guidance

for the primary conduct of others in future. In sharp contrast to such issues, whose determination is akin to factfinding in effect as well as in practice, the process of applying the *Miranda* "custody" standard itself constitutes law declaration, and its effect is to yield precedents that have provided concrete guidance for future cases.

The caselaw demonstrates that there are discrete, recurring factual contexts in which the *Miranda* "custody" issue arises, for example, stationhouse questioning, roadside stops, and the questioning of incarcerated suspects. Because what constitutes "custody" in all these situations "'cannot be fully encompassed in one infallible definition,'" "'[i]nevitably, its outer limits will be marked out through case-by-case adjudication.'" *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503 (1984) (discussing First Amendment "actual malice" issues) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 730-731 (1968)). This process of applying the general "custody" standard to the facts in discrete contexts has provided specific guidance for courts, and for law enforcement as to the meaning of *Miranda* "custody." *See, e.g.*, (Pet. Br. 30-31) (stationhouse questioning); *Pennsylvania v. Bruder*, 488 U.S. 9 (1988) (*per curiam*) (roadside questioning); *Berkemer v. McCarty*, 468 U.S. 420 (1984) (same); *United States v. Menzer*, 29 F.3d 1223, 1230-1233 (7th Cir.) (deciding "custody" issue in relation to an incarcerated suspect based on caselaw addressing "custody" issue in prison context), *cert. denied*, —— U.S. ——, 115 S.Ct. 515 (1994); *Garcia v. Singletary*, 13 F.3d 1487, 1489-1491 (11th Cir.) (same), *cert. denied*, —— U.S. ——, 115 S.Ct. 276 (1994); *United States v. Cooper*, 800 F.2d 412, 414-415 (4th Cir. 1986) (same). Further, the evaluation in particular cases of the relevance and weight of certain recurring factors that arise in different contexts—whether the investigation has focused on a defendant and whether the interrogating officers have a subjective intent to hold the defendant, for example—demonstrably has influenced fu-

ture cases. *See, e.g.*, (Pet. Br. 25-26, 30-31); *United States v. Griffin*, 922 F.2d 1343, 1347-1357 (8th Cir. 1990) (isolating relevant factors from caselaw and resolving "custody" question by analogy to prior precedents); *United States v. Baird*, 851 F.2d 376, 380-382 (D.C. Cir. 1988) (deciding "custody" question by analogy to Court's precedents); *United States v. Bengivenga*, 845 F.2d 593, 595-597 (5th Cir.) (abandoning four factor "custody" test as inconsistent with this Court's precedents), *cert. denied*, 488 U.S. 924 (1988).

Where, as here, "the relevant legal principle can be given meaning only through its application to the particular circumstances of a case," plenary review of this law-making function is imperative for reasons of sound judicial administration. *Miller*, 474 U.S. at 114; *see also Bose*, 466 U.S. at 502 (plenary review appropriate where "the content of the rule is not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common-law adjudication"). As was explained in petitioner's opening brief and unrebutted in respondents' submission, *de novo* review of the application of the *Miranda* "custody" standard is necessary to further the "goal of doctrinal coherence advanced by independent appellate review." *Salve Regina College v. Russell*, 499 U.S. 225, 234 (1991). Given that "deferential appellate review invites divergent development of . . . law among the federal trial courts," (*id.*), the plenary review of *Miranda* "custody" issues will also ensure uniform and predictable legal standards to guide the conduct of law enforcement. In short, *Miranda* "custody" is, by traditional definition, a "mixed" question of law and fact, and functional considerations, far from counselling that the issue be treated as an exceptional case, reinforce the wisdom of that result.[8]

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[8] Respondents also argue that petitioner's reading of *Townsend* is too broad in that it would render virtually all issues subject to plenary review. (Resp. Br. 26-27). Respondents' hyperbole cannot

7. Finally, respondents contend that, however the *Miranda* "custody" question is classified for purposes of review on direct appeal, policy considerations peculiar to habeas review and the nature of *Miranda* claims require that the "custody" issue be treated as a question of fact on collateral attack. (Resp. Br. 34-38). Respondents' suggestion is fundamentally at odds with this Court's precedents, and is insupportable as a matter of judicial administration.[4]

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disguise the fact that there obviously exists a discrete—and voluminous—category of purely factual issues whose determination is accorded appropriate deference on direct and habeas review. Indeed, respondents have identified a wealth of such basic factual issues in the "custody" context alone. *See* (Resp. Br. 14-15). More importantly, the volume of such issues should be irrelevant to their principled treatment under existing law. It was the intent of Congress that the many "factual issues" resolved at the trial court level be presumed correct on habeas review (*see* Pet. Br. 8-9, 13 n.8), but, as this Court has repeatedly recognized, that presumption does not apply to mixed issues—whether they be plentiful or few (*see* Pet. Br. 9-10 & n.6).

[4] Respondents' argument that the *Miranda* "custody" standard should be treated differently because it is "not mandated by the Constitution" or integral to due process (Resp. Br. 34-38) should not long detain the Court. Claims based on *Miranda* have a sufficient nexus to the Fifth Amendment rights that decision serves to be heard on habeas review. *See Withrow v. Williams*, —— U.S. ——, 113 S.Ct. 1745, 1752 (1993). In *Withrow*, although the Court accepted for purposes of the case the premise that *Miranda*'s safeguards are "nonconstitutional" in character, (*id.* at 1752), it made clear that "'[p]rophylactic' though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination *Miranda* safeguards 'a fundamental *trial* right'" that impacts the "correct ascertainment of guilt." *Id.* at 1753 (emphasis in original) (citation omitted). The *Miranda* rule, if not itself constitutionally mandated, guards fundamental constitutional rights, and "[t]he constitutional values protected by the rule make it imperative that judges—and in some cases judges of this Court—make sure that it is correctly applied." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 502 (1984) (discussing "actual malice" standard). Finally, there is no basis in the logic of the Court's *Townsend* and *Miller* analyses for distinguishing between constitutional and

The determinative issue, according to section 2254(d) and this Court's precedents, is whether *Miranda* "custody" is a question of law, fact, or a mixed question of law and fact. *See* (Pet. Br. 8-13). In deciding the issue of the proper characterization of voluntariness claims in *Miller*, the Court rejected a proposed distinction between cases arising on habeas review as opposed to direct appeal. *See Miller*, 474 U.S. at 110-111. Further, this Court and many lower courts in later *direct* appeal cases simply accepted the *Miller* Court's characterization of the voluntariness question on *habeas* review, and exercised plenary review over that question. *See, e.g., Fulminante*, 499 U.S. at 287 (on direct review of a due process voluntariness challenge in a state criminal case, the Court stated that "'the ultimate issue of "voluntariness" is a legal question requiring independent federal determination,'" quoting *Miller*, 474 U.S. at 110); *Fulminante*, 499 U.S. at 303 (Rehnquist, C.J., dissenting) (same).[5]

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quasi-constitutional claims. *See infra*, pages 15-19; *cf. Hernandez*, 500 U.S. at 366 (plurality opinion) ("The reasons justifying a deferential standard of review in other contexts . . . apply with equal force to our review of a state trial court's findings of fact made in connection with a federal constitutional claim.").

[5] Sometimes at the request of the Government, *see United States v. Cichon*, 48 F.3d 269, 275 (7th Cir.) (noting that in an appeal by the Government, the United States "has argued with great vigor" for *de novo* review of a voluntariness claim), *petition for cert. filed*, No. 94-9315 (May 18, 1995), many courts have applied, on the strength of *Miller*, *de novo* review to due process voluntariness challenges on direct appeal. *See, e.g., United States v. Anderson* 929 F.2d 96, 99 (2d Cir. 1991); *United States v. Baird*, 851 F.2d 376, 379-380 (D.C. Cir. 1988); *United States v. Wauneka*, 842 F.2d 1083, 1087 (9th Cir. 1988); *United States v. Fraction*, 795 F.2d 12, 14 (3d Cir. 1986); *United States v. Wilson*, 787 F.2d 375, 380 (8th Cir.), *cert. denied*, 479 U.S. 857 (1986); *Gray v. Commonwealth*, 233 Va. 313, 342-325, 356 S.E.2d 157, 163, *cert. denied*, 484 U.S. 873 (1987).

The Court's refusal to draw the distinction respondents seek is well warranted, as such a distinction would be inconsistent with the logic of the Court's analysis in separating questions of fact from legal or mixed questions for purposes of ascertaining the appropriate standard of review of judicial determinations. It is difficult to conceive how, consistent with the Court's analysis, an issue which is clearly one of law or a mixed question under *Townsend*'s definitions may be transformed into one of fact simply by virtue of the jurisdictional basis of a court's decision-making power. *See Hayes v. Kincheloe*, 784 F.2d 1434, 1436 (9th Cir. 1986), *cert. denied*, 484 U.S. 871 (1987); Brief of Amicus Curiae on the Merits In Support of Respondents of the Attorney General for the State of Florida 7 ("a 'factual' issue does not metamorphose into a 'legal' issue just because the proceeding changes"), 9.

Nor can a jurisdictional distinction be reconciled with the *Miller* Court's functional analysis, which dictates that the relevant inquiry is whether deference should be accorded trial courts' determinations of certain nominally "mixed" questions because trial courts, whether state or federal, are in an "appreciably better position" to decide the issues due to their essentially factual nature. *Miller*, 474 U.S. at 117. It would "surely pervert the concept of federalism," *Bose*, 466 U.S. at 499, to hold that a state trial court is appreciably better suited to resolve such questions than a federal reviewing court for purposes of habeas review, but that a federal district court is not equally qualified because the case arises on direct appeal.

Accordingly, this Court has often applied the same analytical principles in determining whether an issue is one of fact, law or a mixed question, regardless of the nature of the case, relying on its direct appeal precedents in habeas cases, *see, e.g., Miller*, 474 U.S. at 110-111, and its habeas precedents in direct appeal cases, *see, e.g., Fulminante*, 499 U.S. at 287; *Hernandez v. New York*, 500 U.S. 352, 365-369 (1991) (plurality opinion), as well as citing its civil precedents in criminal cases, *see, e.g., id.* at 364-370; *Miller*, 474 U.S. at 113-114; *see also* (Resp. Br. 16, 20-24) (relying on civil precedents), and its criminal precedents in its civil cases, *see, e.g., Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403 (1990); *Pierce v. Underwood*, 487 U.S. 552, 559-560 (1988).

The Court's rejection of jurisdictional distinctions is not only analytically sound, it is also supported by strong considerations of judicial administration. The circuits are split on the proper characterization of a range of issues,[6]

[6] For example, respondents rely in their brief on cases holding that the voluntariness of a *Miranda* waiver is a question of fact. *See, e.g.*, (Resp. Br. 18-19). However, a number of circuits have held this issue to be a mixed question, subject to *de novo* review. *See, e.g., Alston v. Redman*, 34 F.3d 1237, 1253 (3d Cir. 1994) (voluntariness of a *Miranda* waiver is a mixed question subject to plenary review), *cert. denied*, —— U.S. ——, 115 S.Ct. 1122 (1995); *Collazo v. Estelle*, 940 F.2d 411, 415-416 (9th Cir. 1991) (voluntariness of a *Miranda* waiver is a mixed question reviewed *de novo* but intelligent and knowing quality of waiver are factual questions), *cert. denied*, 502 U.S. 1031 (1992); *Ahmad v. Redman*, 782 F.2d 409, 413 (3d Cir.) (voluntariness of *Miranda* waiver is a mixed question reviewed *de novo*), *cert. denied*, 479 U.S. 831 (1986); *see also Toste v. Lopes*, 861 F.2d 782, 783 (2d Cir. 1988) ("[t]he validity of a [*Miranda*] waiver is a matter for independent federal determination"), *cert. denied*, 490 U.S. 1112 (1989).

The circuits are also divided on the proper characterization of the question whether a "seizure" has occurred for Fourth Amendment purposes. *See, e.g., United States v. Wilson*, 953 F.2d 116, 121 (4th Cir. 1991) (question of fact subject to clearly erroneous review); *United States v. McKines*, 933 F.2d 1412, 1424-1426 (8th Cir.) (*en banc*) (question of law), *cert. denied*, 502 U.S. 985 (1991); *United States v. Valdiosera-Godinez*, 932 F.2d 1093, 1098 n.1 (5th Cir. 1991) (question of fact subject to clearly erroneous review), *cert. denied*, —— U.S. ——, 113 S.Ct. 2369 (1993); *United States v. Montilla*, 928 F.2d 583, 588 (2d Cir. 1991) (question of law reviewed *de novo*); *United States v. Maragh*, 894 F.2d 415, 417-418 (D.C. Cir.) (question of law reviewed *de novo*), *cert. denied*, 498 U.S. 880 (1990).

and doubtless will rely upon the analysis articulated in this case when separating law from fact in other criminal-law contexts. *See, e.g., United States v. Cruz*, 910 F.2d 1072, 1078 & n.2 (3d Cir. 1990), *cert. denied*, 498 U.S. 1039 (1991); *Martin v. Kemp*, 760 F.2d 1244, 1247 (11th Cir. 1985). Were the fact/law allocation to be based, as respondents suggest, on a hostility toward habeas review of *Miranda* claims, in addition to the definitional analysis and functional considerations presently employed, it would simply compound the difficulty of drawing distinctions already deemed "elusive," *Miller*, 474 U.S. at 113, and " 'vexing,' " *Bose*, 466 U.S. at 501 (quoting *Pullman-Standard*, 456 U.S. at 288).[7]

[7] Respondents also take issue with petitioner's summary of the decisions of the circuit courts, in part because respondents misapprehend petitioner's analysis. The heart of the issue presented is whether *Miranda* "custody" is a question of law or fact or a mixed question; from that determination, the appropriate standard of review to be applied should be clear under section 2254(d) and this Court's precedents. *See* (Pet. Br. 8-10; Resp. Br. 10). Far from equating the clearly erroneous standard of review with *de novo* review (Resp. Br. 21 n.6), petitioner agrees that the application of the clearly erroneous standard of review presumably is functionally equivalent to review for fair support in the record. However, petitioner did not collapse, as respondents do, the two questions—the characterization of the "custody" issue and the standard of review applied—and assume from the latter a determination regarding the former (*see, e.g.*, Resp. Br. 12, 29-30). Petitioner's summary of the circuit court precedents therefore isolates those that address the determinative issue—the correct characterization of *Miranda* custody as a factual, legal or mixed question—and demonstrates that nine circuits have done so, whether on direct or habeas review. *See* (Pet. Br. 18-19 n.10); *see also supra*, pages 15-18 (characterization of issues should be the same on direct and habeas review). For the sake of completeness, petitioner also attempted to provide the Court with a sampling of cases in each circuit demonstrating the confusion in and among the circuits—those that have addressed the characterization issue and those that have not—in applying the appropriate standard of review. *See* (Pet. 18-19 nn.10, 11).

Consideration of the most recent precedents in the Tenth and Eleventh Circuits cited in petitioner's opening brief (Pet. Br. 18-19 n.10) may also cure respondents' disagreement with petitioner's characterization of the positions of those circuits (Resp. Br. 12). *See Tenth Circuit*: *United States v. Griffin*, 7 F.3d 1512, 1516-1519 (10th Cir. 1993) (indicating that the "custody" inquiry presents a legal issue that it reviewed *de novo*); *United States v. Wynne*, 993 F.2d 760, 764-765 (10th Cir. 1993); *Eleventh Circuit*: *United States v. Adams*, 1 F.3d 1566, 1575 (11th Cir. 1993), *cert. denied*, —— U.S. ——, 114 S.Ct. 1310 (1994) (stating, in reversing the trial court's determination that the defendant was not in custody for *Miranda* purposes, that "[t]he district court's findings of fact regarding the motion to suppress are to be respected unless clearly erroneous, but the application of law to those facts is reviewed de novo" and citing *Jacobs v. Singletary*, 952 F.2d 1282, 1291 (11th Cir. 1992) (on habeas review, *Miranda* "custody" is a mixed question reviewed *de novo*)).

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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June 14, 1995

(9)

No. 94-6615

IN THE

Supreme Court of the United States

October Term, 1995

CARL THOMPSON,

Petitioner,

v.

PATRICK KEOHANE, Warden,
BRUCE M. BOTELHO, Attorney General,
State of Alaska,

Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

BRIEF OF AMICUS CURIAE ON THE MERITS IN SUPPORT OF RESPONDENTS*

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QUESTION PRESENTED

In a habeas corpus action brought by a state prisoner, did the Ninth Circuit Court of Appeals err in applying a presumption of correctness to the state court's finding that Thompson was not in custody when he was interviewed by the police?

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INTEREST OF AMICUS CURIAE

This case presents the question of the standard of review to be applied in habeas proceedings to the custody issue under *Miranda v. Arizona*, 384 U.S. 436 (1966). The states are required to defend their judgments of conviction in federal court based on claims that *Miranda* was violated. The states, therefore, have a substantial interest in the resolution of the question presented.

SUMMARY OF ARGUMENT

The question of custody for the purpose of giving *Miranda* warnings is a factual issue to be resolved by state courts, whose findings cannot be overturned in a federal habeas proceeding, unless they are not fairly supported by the record. Resolution of the custody issue requires application of a reasonable person standard and evaluation of multiple factors. Trial judges are in a better position than reviewing courts to perform these functions. Due to myriad factual situations, de novo review of custody determinations would not guarantee uniformity in the law.

Miranda is a judicially-created rule of procedure. It can be violated without violating the constitution. When that happens, evidence that was obtained by constitutionally permissible police conduct is excluded from a trial. Excluding such evidence interferes with the powers and functions of the other branches of the government to create and enforce the criminal law. It, therefore, would be inappropriate to equate *Miranda* with constitutional rights in order to justify creating a de novo standard of review in habeas proceedings.

The cost of relitigating *Miranda* issues de novo in federal court outweighs any perceived benefits. State courts fairly and competently adjudicate *Miranda* claims, and their decisions are rarely overturned on habeas review. Scarce resources must be spent to defend state judgments against frivolous and harassing attacks by state prisoners. The result is needless friction between the two court systems.

ARGUMENT

WHETHER A PERSON WAS "IN CUSTODY" DURING A POLICE INTERVIEW IS A QUESTION OF FACT ENTITLED TO THE § 2254(D) PRESUMPTION OF CORRECTNESS.

Section 2254(d)(8) of Title 28, United States Code, provides, in pertinent part:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court...shall be presumed to be correct, unless...the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.... [T]he burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

This provision has been applied to state court determinations of competency to stand trial—*Maggio v. Fulford*, 462 U.S. 111, 113-117 (1983); competency to waive right to postconviction review—*Demosthenes v. Baal*, 495 U.S. 731, 735 (1990); culpability—*Cabana v. Bullock*, 474 U.S. 376, 387-390 (1986) (did the defendant kill, attempt to kill, or intend that a killing take place); *disavowed on other grounds, Pope v. Illinois*, 481 U.S. 497 (1987); voluntariness of guilty plea in a prior proceeding—*Marshall v. Lonberger*, 459 U.S. 422, 431-437 (1983) (did the defendant know that he was pleading guilty to attempted murder); and juror bias—*Patton v. Yount*, 467 U.S. 1025, 1036-38 (1984) (could the jurors set aside their bias based on pretrial publicity), *Wainwright v. Witt*, 469 U.S. 412, 426-430 (1985) (could the

juror who opposed capital punishment set aside her bias), *Rushen v. Spain*, 464 U.S. 114, 120-122 (1983) (was the juror biased because a friend of hers had been murdered in an unrelated case and because she communicated privately with the judge on the matter during the trial). The States joined herein as amici curiae seek application of § 2254(d)(8) to *Miranda* issues as well.[1]

The prophylactic rule created in *Miranda* has spawned considerable litigation on a wide range of issues.[2] The focus of the analysis in this brief is the custody issue. A suspect has been taken into custody when he has been formally arrested or when his freedom of movement has been restricted to the degree associated with a formal arrest. All of the circumstances surrounding the interview are relevant to a determination of this issue, except for the uncommunicated state of mind of either the suspect or the interviewing officer. The test turns on what a reasonable person in the suspect's position would have understood his position to be. *Stansbury v. California*, 114 S.Ct. 1526, 128 L.Ed.2d 293, 298-301 (1994). Some of the factors to be considered in determining the custody issue are (1) the location of the interview, (2) who initiated the interview; (3) the suspect's

1 In *Wright v. West*, 112 S.Ct. 2482 (1992), the Court, in the interests of federalism, finality, and fairness, should have established a deferential standard of review for all mixed questions on habeas review, but the Court was unpersuaded to do so in that case. Although Justice O'Connor, concurring in *Wright*, opted for plenary review of mixed questions, *id.*, at 2493-97, in a later case, she correctly argued for elimination of all review of fully and fairly litigated *Miranda* issues, *Withrow v. Williams*, 113 S.Ct. 1745, 1756 (1993) (O'Connor, J. concurring and dissenting).

2 For example: was the suspect in custody; was the suspect interrogated; were warnings given; were warnings adequate; did the suspect waive his right to counsel and silence; were the waivers knowingly and intelligently entered; were the waivers voluntary; did the suspect reassert his right to counsel or right to silence at anytime during questioning; and did exigent circumstances exist which excused the failure to give the warnings.

mode of transportation to the interview; (4) the restrictions placed on the suspect's freedom during the interview; and (5) the suspect's knowledge that he was free to leave based on communications with the police.

The circuit courts are divided on the standard of review of the custody issue. Several circuit courts have applied the clearly erroneous standard or its habeas counterpart (fairly supported by the record).[3] A deferential standard of review also has been applied to the comparable issue of whether a person was "seized" under the Fourth Amendment.[4] By contrast, a few of the circuit courts have reviewed the issue de novo, either in the context of determining custody under *Miranda*,[5] or in the context of determining a seizure under the Fourth Amendment.[6] The state courts likewise are split

3 *U.S. v. Lanni*, 951 F.2d 440, 443 (1st Cir. 1991); *U.S. v. Griffin*, 922 F.2d 1343, 1347-48 (8th Cir. 1990); *Jenner v. Smith*, 982 F.2d 329, 334 (8th Cir. 1993) (state habeas), *cert. denied*, 114 S.Ct. 81 (1993); *People of the Territory of Guam v. Palomo*, 35 F.3d 368, 375 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 750 (1995); *Cordoba v. Hanrahan*, 910 F.2d 691, 693 (10th Cir.) (state habeas), *cert. denied*, 498 U.S. 1014 (1990); *Purvis v. Dugger*, 932 F.2d 1413, 1418-19, 1422 (11th Cir. 1991) (state habeas), *cert. denied*, 503 U.S. 940 (1992).

4 *U.S. v. Harris*, 31 F.3d 153, 155 (4th Cir. 1994); *U.S. v. Silva*, 957 F.2d 157, 158 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 250 (1992); *U.S. v. Teslim*, 869 F.2d 316, 321 (7th Cir. 1989); *U.S. v. Dewitt*, 946 F.2d 1497, 1502 (10th Cir. 1991), *cert. denied*, 502 U.S. 1118 (1992).

5 *U.S. v. Kirsteins*, 906 F.2d 919, 923 (2d Cir. 1990); *U.S. v. Calisto*, 838 F.2d 711, 718 (3rd Cir. 1988); *U.S. v. Cooper*, 800 F.2d 412, 414-15 (4th Cir. 1986); *Davis v. Allsbrooks*, 778 F.2d 168, 171 (4th Cir. 1985) (state habeas); *U.S. v. Collins*, 972 F.2d 1385, 1406 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1812 (1993); *Cobb v. Perini*, 832 F.2d 342, 346 (6th Cir. 1987) (state habeas), *cert. denied*, 486 U.S. 1024 (1988); *U.S. v. Torkington*, 874 F.2d 1441, 1445 (11th Cir. 1989); *Jacobs v. Singletary*, 952 F.2d 1282, 1291 (11th Cir. 1992) (state habeas).

6 *U.S. v. McKines*, 933 F.2d 1412, 1426 (8th Cir. 1991) (en banc), *cert. denied*, 502 U.S. 985 (1991); *U.S. v. Maragh*, 894 F.2d 415, 417 (D.C. 1990), *cert. denied*, 498 U.S. 880 (1990).

on the custody issue, some treating it as a question of fact[7] and others as a question of law.[8]

In a concurring and dissenting opinion in *U. S. v. Humphrey*, 34 F.3d 551, 559 (7th Cir. 1994), Chief Judge Posner recently explained *why* the custody issue should be reviewed under a deferential standard of review, not de novo:

> The question whether a given interrogation was "custodial," like the question whether the defendant's statement came in response to an "interrogation," is one of applying a legal concept to facts, since "custody" is a legal concept, just like "interrogation." It might seem that "custody" is only nominally a legal concept—that you don't have to be a lawyer to know that a person is in custody when he is not free to leave; if he tried he would be stopped. The intentions of the police and the understanding of the suspect are facts that, unlike negligence, or possession, or "interrogation," do not require any filtering through legal concepts. If that were true, it would be even plainer that the proper standard of appellate review was clear error, as no one doubts that in the case of a "pure" question of fact, the trial court's finding must be upheld unless clearly erroneous.

7 *People v. Dracon*, 884 P.2d 712, 717 (Colo. 1994); *State v. Primus*, 440 S.E.2d 128, 129 (S.C. 1994); *State v. Carroll*, 645 A.2d 82, 87 (N.H. 1994); *State v. Kelly*, 435 N.W.2d 807, 813 (Minn. 1989); *People v. Foster*, 552 N.E.2d 1112, 1125 (Ill. App. Ct. 5 Dist. 1990), *appeal denied*, 555 N.E.2d 380 (Ill. 1990); *Murry v. State*, 635 S.W.2d 237, 241 (Ark. 1982); *People v. Yukl*, 307 N.Y.S.2d 857, 859, 256 N.E.2d 172 (N.Y. 1969), *cert. denied*, 400 U.S. 851 (1970); *Maine v. State*, 607 A.2d 1185, 1194-95 (Del. 1992).

8 *State v. Sweatt*, 427 S.E.2d 112, 118 (N.C. 1993); *State v. Clappes*, 344 N.W.2d 141, 143 (Wis. 1984); *Matter of E.A.H.*, 612 A.2d 836, 838 (D.C. App. 1992).

> It is not true. The legal definition of custody departs from the lay understanding. The intentions of the police have been ruled out of bounds and so too the understanding of the suspect. He is in custody only if a reasonable person in his position would not think himself free to leave. As in the law of negligence, so in the law as to when the *Miranda* warnings must be given, the question whether a person acted reasonably in the circumstances facing him is a question about the application of a legal standard (reasonableness) to the facts. No doubt the line between pure facts on the one hand and on the other hand, the application to them of a legal standard that is as non-technical—as commonsensical—as reasonableness is a faint one. But that is simply one more reason why both questions are and should be governed by the same standard of review, that of clear error. [citations to cases and rules omitted]

Albeit *Humphrey* was a direct appeal case, a "factual" issue does not metamorphose into a "legal" issue just because the proceeding changes. If the clearly erroneous standard of review is to be applied to the issue on direct appeal, the "fairly supported by the record" standard must be applied to it on habeas review.[9]

9 Cases obviously are not decided merely by determining what happened (who, what, when, where, and how). Cases involve either pure questions of law, such as the facial constitutionality of a statute, or mixed questions of law and fact. The most common example of the latter is a tort case. There the jury must decide what the defendant did (historical fact) and whether his conduct was negligent by comparing it to that of a reasonable person (application of law to facts). *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990) (issue of negligence generally subject to deferential review). To say that issues involving law application are to be reviewed de novo is to say that all issues must be reviewed de novo.

In *Miller v. Fenton*, 474 U.S. 104, 113-114 (1985), the Court acknowledged that labeling an issue "is sometimes as much a matter of allocation as it is of analysis," and that "the fact/law distinction at times has turned on a determination that...one judicial actor is better positioned than another to decide the issue in question." Taking that approach, there are two reasons for allocating the custody issue to the trial court. First, trial courts are an essential part of the judicial system; they are not just entrance gates to higher courts for resolution of disputes:

> That an appellate court not simply ignore that the case has been earlier decided expresses in part a recognition that the trial court was more than an entrance gate. When an appellate court starts afresh, a trial court's function is reduced to that of collecting data and providing an opportunity for an extrajudicial resolution of the dispute. Even this function would experience a reduction in value as expectation of a judicial decision of consequence shifts wholly away from the trial court. The pyramidal shape of our present court structure rests on the institutional integrity of the trial court as a distinct part of the justice system. As such review is extended upward, only the last "court" in the chain retains full institutional integrity. More is afoot here than nostalgic or romantic reverence for trial courts. Finality and all values bound up in that precept are implicated.

O'Bryan v. Estelle, 714 F.2d 365, 392 (5th Cir. 1983) (Higginbotham, J. concurring), *cert. denied*, 465 U.S. 1013 (1984), cited with approval in *Wainwright v. Witt*, 469 U.S. at 428 n. 10 (1985).

Second, the custody issue involves a multifactor test, which inextricably intertwines fact and law:

> Multifactor tests do not comprise separable "questions of law." Rules of law influence the application of the factors, and appellate courts may ensure that district judges understand and apply these rules. But whenever the court must determine "reasonableness" or climb the tiers of a multifactor approach, the result is a gestalt, not a legal conclusion. Little is gained, and much can be lost, by having three judges redo the work of one.

U.S. v. Malin, 908 F.2d 163, 169-170 (7th Cir. 1990) (Easterbrook, J. concurring) (discussion of probable cause determinations), *cert. denied*, 498 U.S. 991 (1990). Although *Malin* was a direct appeal case, Judge Easterbrook's analysis is equally applicable in a habeas proceeding. No rational justification exists for applying a more stringent standard of review to a habeas case than to a direct appeal case.

De novo review of fact-bound issues, like the one at issue here, will not guarantee uniformity in the law. In *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. at 405, the Court stated:

> [S]ome variation in the application of a standard based on reasonableness is inevitable. Fact-bound resolutions cannot be made uniform through appellate review, de novo or otherwise. An appellate court's review of whether a legal position was reasonable or plausible enough under the circumstances is unlikely to establish clear guidelines for lower courts; nor will it clarify the underlying principles of law. [citations and quotations omitted]

Of a similar vein was the Court's reasoning in *Container Corp. of America v. Franchise Tax Bd*, 463 U.S. 159, 176 (1983), a state taxing power case:

> It will do the cause of legal certainty little good if this Court turns every colorable claim that a state

> court erred in a particular application of those principles [defining the constitutional limits on the unitary business principle] into a de novo adjudication, whose unintended nuances would then spawn further litigation and an avalanche of critical comment. Rather, our task must be to determine whether the state court applied the correct standards to the case; and if it did, whether its judgment "was within the realm of permissible judgment." [citation and footnotes omitted]

See, also, Judge Mikva's dissenting opinion in *U.S. v. Maragh,* 894 F.2d at 420-425, relating to the standard of review of the "seizure" issue under the Fourth Amendment.

Other reasons exist for reviewing *Miranda* issues deferentially in habeas proceedings. First, proof of a *Miranda* violation does not establish a constitutional violation, and absent a constitutional (or statutory) violation, there is no authority for federal courts to reverse state convictions. *Victor v. Nebraska,* 114 S.Ct. 1239, 127 L.Ed.2d 583, 597 (1994) ("[W]e have no supervisory power over the state courts").[10] If federal courts insist on reviewing nonconstitutional claims of state prisoners, at the very least, a deferential standard of review must be applied. Second, when the judiciary suppresses constitutionally permissible evidence, it usurps the power of the legislature to enact substantive criminal law and the power of the executive to enforce it.[11] Third, *Miranda* regulates the conduct of the police during a criminal investigation. It does not regulate the conduct of the judge or the parties during the course of the trial. Given

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10 *See, also,* Sara Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts,* 84 COLUM. L. REV. 1433, 1514-1516 (1984).

11 Beale, *supra,* note 10 at 1515-1516.

that their own conduct is not at issue, state judges can be expected to decide *Miranda* issues impartially. Fourth, the remedy for *Miranda* violations is at odds with the primary function of the courts to seek the truth. *U.S. v. Nixon,* 418 U.S. 683, 709 (1974) ("The very integrity of the judicial system and public confidence depend on full disclosure of all the facts, within the framework of the rules of evidence"). Reliable confessions are sometimes suppressed under *Miranda*. Fifth, *Miranda* violations do not implicate the factual accuracy of the defendant's conviction. Sixth, convictions have not been historically overturned because of *Miranda* violations. Seventh, there are no inherent problems in raising or litigating *Miranda* issues in state court.

State courts "possess primary authority for defining and enforcing the criminal law," including federal constitutional rights of the accused. *Kuhlmann v. Wilson,* 477 U.S. 436, 453-54 n. 16 (1986); *Tibbs v. Florida,* 457 U.S. 31, 45 (1982).[12] In fulfilling their duty under our dual system of government, the state courts are entitled to the same degree of respect as is accorded the federal courts:

> [C]omity...[means] a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a...belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound

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12 In 1982, 12 million criminal cases were filed in state courts and in the District of Columbia, compared to 32,700 in federal court. *Michigan v. Long,* 463 U.S. 1032, 1042 n. 8 (1983).

> to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

Younger v. Harris, 401 U.S. 37, 44-45 (1971).

Federal habeas review is *not* "the principal avenue for challenging a conviction." It is an "extraordinary remedy" against fundamentally unfair convictions. *Brecht v. Abrahamson*, 113 S.Ct. 1710, 1719 (1993); *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983) ("Federal courts are not forums in which to relitigate state trials"). In 1990, state prisoners filed 10,809 federal habeas petitions, and the district courts disposed of 10,125 petitions, approximately 90% of which required, by implication, action by the states to defend their judgments and sentences. Of 1,626 federal petitions disposed of in four states (California, Alabama, New York, and Texas), only 17 (1.05%) were granted.[13] In

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13 VICTOR FLANGO, NATIONAL CENTER FOR STATE COURTS, STATE JUSTICE INSTITUTE, HABEAS CORPUS IN STATE AND FEDERAL COURTS 14, 22, 61, (1994) (hereinafter 1994 State Justice Institute Study).

consideration of these statistics, it is evident that state prisoners have turned habeas into an "ordinary" remedy and converted its purpose to that of relieving the boredom of prison life and providing a mechanism for continued acts of aggression against society. Habeas review, as such, is a constant source of friction between the two court systems. *Kuhlmann v. Wilson*, 477 U.S. at 453-54 n. 16; *Engle v. Isaac*, 456 U.S. 107, 126-128 (1982).

State courts fairly and competently adjudicate federal claims. In 1983, Professors Solimine and Walker published the results of a study of 1,046 decisions of state appellate and federal district courts on federal issues involving the First, Fourth, and Fourteenth Amendments covering a 7-year period (1974 through 1980). The study disclosed that "there is simply no widespread disregard for the vindication of federal rights in state appellate courts."[14] In 1989, the authors, rebuking some criticisms, responded that "based on the only extant empirical evidence, relative parity between state and federal courts exists, and parity bodes well for the continued operation of judicial federalism."[15] The authors further argued that parity exists because of the increasing similarity in state and federal rules of procedures; the relative similarity in the characteristics of state and federal judges; the selection of state and federal judges from the same milieu; the frequency with which state judges are appointed to the federal bench; the uncontested nature of most judicial elections; and the trend toward merit selection

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14 Michael Solimine & James Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L. Q. 213, 252 (1983) (hereinafter Solimine I).

15 Michael Solimine & James Walker, *State Court Protection of Federal Constitutional Rights*, 12 HARV. J.L. & PUB. POLY 127, 138-148 (1989) (hereinafter Solimine II).

of state judges.[16] The study conducted by the State Justice Institute revealed that "state courts are doing a good job in protecting federal constitutional rights."[17] Two former state court judges, who are now on the federal bench, Justice O'Connor and Judge Aldisert, have maintained similar views.[18]

State courts are neither hostile nor indifferent to *Miranda* issues. In 1981, Professor Gruhl published the results of a survey of state and federal supreme court opinions decided between 1976 and 1979 on four *Miranda* issues. The study disclosed that "state supreme courts generally enforced the requirements [of *Miranda*] throughout the 1970s," consistent with precedent from this Court.[19] Several states have decided *Miranda* issues in the defendant's favor only to be reversed by this Court.[20] Other states give defendants

16 Solimine I, 10 HASTINGS CONST. L. Q. at 225-232; Solimine II, 12 HARV. J. OF L. & PUB. POLICY at 135-137.

17 1994 State Justice Institute Study, 90-91.

18 *See, e.g.*, Sandra O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 813-814 (1981) ("There is no reason to assume that state court judges cannot and will not provide a 'hospitable forum' in litigating federal constitutional questions"); Ruggero Aldisert, *State Courts and Federalism in the 1980s: Comment*, 22 WM. & MARY L. REV. 821, 824 (1981) ("My own evaluation of both state supreme court and federal circuit judges is that most meet Professor Bator's test of '[c]onscientiousness, dedication, idealism, openness, enthusiasm, [and] willingness to listen and to learn—all the mysterious components of the subtle art of judging well.' ").

19 John Gruhl, *State Supreme Courts and the U.S. Supreme Court's Post-Miranda Rulings*, 72 J. CRIM. LAW & CRIMINOLOGY 886, 911 (1981).

20 *See, e.g.*, *California v. Beheler*, 463 U.S. 1121 (1983); *Colorado v. Spring*, 479 U.S. 564 (1987); *Colorado v. Connelly*, 479 U.S. 157 (1986); *Illinois v. Perkins*, 496 U.S. 292 (1990); *Minnesota v. Murphy*, 465 U.S. 420 (1984); *Oregon v. Mathiason*, 429 U.S. 492 (1977); and *Pennsylvania v. Bruder*, 488 U.S. 9 (1988).

greater rights than does *Miranda*,[21] and at least two states have read *Miranda* into the state constitution.[22]

The Court has repeatedly expressed its confidence in the state courts' ability and willingness to adequately protect federal constitutional rights. *See, e.g., Huffman v. Pursue*, Ltd., 420 U.S. 592, 611 (1975) ("Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities," and "[t]his we refuse to do"); *Stone v. Powell*, 428 U.S. 465, 493 n. 35 (1976) ("[W]e are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States"); *Moore v. Sims*, 442 U.S. 415, 430 (1979) ("The price exacted in terms of comity would only be outweighed if state courts were not competent to adjudicate federal constitutional claims—a postulate we have repeatedly and emphatically rejected"); and *Pennzoil v. Texaco*, 481 U.S. 1, 17 (1987) ("[W]e cannot say that [the Texas] courts, when this suit was filed, would have been any less inclined than a federal court to address and decide the federal constitutional claims"). The results reached in these cases demonstrate clear acknowledgment of the state courts' comprehension of federal constitutional questions and their willingness to decide the issues in a responsible manner. *Stone* held that fully and fairly litigated Fourth Amendment search and seizure claims would not be relitigated on habeas, and the other three cases held that district courts could not intervene in pending state criminal and civil proceedings. In subsequent decisions—*Maggio, Demosthenes, Cabana,*

21 *See, e.g., Utah v. Wood*, 868 P.2d 70, 82 (Utah 1993); *Bryan v. State*, 571 A.2d 170, 175-177 (Del. 1990); *State v. Reed*, 627 A.2d 630, 643-47 (N.J. 1993); *State v. Stoddard*, 537 A.2d 446 (Conn. 1988); *State v. Gravel*, 601 A.2d 678, 685 (N.H. 1991).; *Com. v. Snyder*, 597 N.E.2d 1363, 1368-69 (Mass. 1992).

22 *Traylor v. State*, 596 So.2d 957, 965-966 (Fla. 1992); *State v. Menne*, 380 So.2d 14, 17 (La. 1980), *cert. denied*, 449 U.S. 833 (1980).

Marshall, Patton, Witt, and Rushen—the Court has maintained the fundamental trust in the state courts that was expressed in *Stone*.[23]

In summary, close supervision of *Miranda* claims is no longer required. After thirty years, the law is well settled, and courts fully understand it. Absent some compelling reason to do otherwise, the same deferential standard applied to the "seizure" issue under *Stone v. Powell* should be applied to the "custody" issue under *Miranda*. State courts have proven their sensitivity and receptiveness to *Miranda* claims, and they will continue to provide as valid and constitutionally sound review as any federal court.

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23 Even academic critics of the Court's recent habeas jurisprudence concede that the presumption of factual correctness found in section 2254(d) is justified. *See, e.g.*, LARRY YACKLE, RECLAIMING THE FEDERAL COURTS 171-172 (1994). The most crucial part of a case is the fact finding, given that the outcome of a case frequently turns on which witnesses are believed. If state judges are competent and trustworthy to find the facts, surely they can take the incremental and necessary step of applying the law to the facts.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed. The Court should hold that in an action brought under 28 U.S.C. § 2254, the federal court must give deference to a state court's finding on the issue of whether a person was in custody when interviewed by the police.

Respectfully submitted,

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No. 94-6615

IN THE

Supreme Court of the United States

October Term, 1995

CARL THOMPSON,

Petitioner,

v.

PATRICK KEOHANE, Warden,
BRUCE M. BOTELHO, Attorney General,
State of Alaska,

Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

BRIEF OF AMICUS CURIAE ON THE MERITS IN SUPPORT OF RESPONDENTS

APPENDIX

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

1. When a defendant seeks to exclude a pretrial statement on *Miranda* grounds and the trial judge finds he was not in custody, what standard of review applies to that finding?

2. Can a person be in custody, for the purpose of the *Miranda* rule, when the police have neither physically restrained him nor commanded him to remain?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves a collateral attack on the final judgment of a state trial court based on an issue relating to the applicability of a prophylactic rule. The unnecessary relitigation of such issues is contrary to the rights of victims and society which CJLF was formed to advance.

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1. Both parties have consented to the filing of this brief.

SUMMARY OF FACTS AND CASE

On September 10, 1986, the body of Dixie Thompson, petitioner's ex-wife, was found floating in a lake. She had been stabbed 29 times and beaten severely. Brief in Opposition 1-2. On September 11, 1986, following a press release requesting the public's help in identifying the body, Thompson called police and told them that the description of the body matched that of his former wife, whom he had last seen in August. Thompson called again the next day and was told that the body was indeed his former wife's. *Id.*, at 2.

On September 15, 1986, Sergeant Stockard requested that Thompson come to trooper headquarters to identify some of Dixie's personal belongings. *Id.*, at 2-3. At this point, troopers suspected Thompson as the killer. *Id.*, at 3. Petitioner drove his own truck to headquarters, where he identified the items. Brief for Petitioner 2. He was then questioned for two hours, during which he was told several times that he was not under arrest and could leave at any time. Brief in Opposition 3. Sergeant Stockard did not advise Thompson of his *Miranda* rights because he had no intention of arresting Thompson and did not feel he was in custody. *Id.*, at 3.

Thompson initially denied involvement in his ex-wife's death. After being informed of the evidence against him, he finally admitted to killing her and gave troopers his description of what happened. *Id.*, at 3-4. Following the interview, Thompson's truck was impounded and Thompson was driven home, where he was arrested nearly two hours later. *Id.*, at 4.

Thompson was indicted for first-degree murder and tampering with physical evidence. Brief for Petitioner 3. His motion to suppress his confession on the basis of a *Miranda* violation was denied by the trial judge, who found that Thompson was not in custody when he confessed. *Id.*, at 3-4. He was convicted of both crimes. *Id.*, at 4-5.

The Alaska Court of Appeals affirmed Thompson's conviction and the admission of his confession, finding that Thompson was not in custody and *Miranda* was inapplicable. *Id.*, at 5. The Alaska Supreme Court denied review. On petition to the federal District Court for a writ of habeas corpus, Thompson argued that admission of his confession violated *Miranda*. *Id.*, at 5. The District Court denied the writ, concluding that the state court's finding that petitioner was not in custody was entitled to a presumption of correctness under 28 U. S. C. § 2254(d). *Id.*, at 6. The Ninth Circuit affirmed on the same basis. *Ibid.*

SUMMARY OF ARGUMENT

When *Miranda* became the primary means by which the admissibility of a confession was determined, it was intended to simplify the law. Repeated *de novo* review of the custody question thwarts this purpose. A finding of custody is a fact-specific determination. It is usually an easy question for a court, and even when it is not, *de novo* review is not required. Unlike the issue of voluntariness, there are no *stare decisis* issues affecting its designation. There are no constitutional impediments to entrusting trial courts with the custody issue; like many other factual issues, a trial judge is better equipped to decide it.

If this Court decides that custody should be a question of law, then it should further narrow the definition of custody such that it requires a seizure. This will enhance the clarity of *Miranda* and make the presumption of coercion more accurate.

If Congress passes habeas reform before this case is argued, this Court should take supplemental briefing on the effect of that legislation.

ARGUMENT

I. Custody should be a factual determination made by the trial court, reviewed for clear error on appeal and entitled to deference on habeas corpus.

Under *Miranda* v. *Arizona*, 384 U. S. 436, 468 (1966), the only inquiry when seeking to admit a statement made during custodial interrogation is whether the suspect was informed of his constitutional rights. Speculation on the facts and circumstances surrounding the interrogation is irrelevant, as is the suspect's prior knowledge of his rights. *Ibid.*

Thus, *Miranda* created a mandatory, conclusive presumption that all custodial interrogation was "inherently compelling" under the Fifth Amendment and required the exclusion of any statement made under such circumstances unless appropriate warnings had been given. *Id.*, at 476-477. Both custody and interrogation are required to evoke the presumption; the most intense questioning need not be preceded by warnings if the suspect is not in custody. See *Oregon* v. *Elstad*, 470 U. S. 298, 309 (1985).

The *Miranda* Court did not define "custody." In fact, this Court has acknowledged that "the task of defining 'custody' is a slippery one," such that application of the *Miranda* rule by police officers could not be expected to be error free. *Id.*, at 309. At the same time, the *Miranda* decision was intended "to give concrete constitutional guidelines for law enforcement agencies and courts to follow." *Miranda*, *supra*, 384 U. S., at 441-442.

The inherent dichotomy between the rule's purpose and its application with respect to custody has resulted in confusion among both state and federal appellate courts. Making custody a question of fact will reduce this problem and better serve the interests *Miranda* was designed to protect.

A. The Purpose of Miranda.

The *Miranda* decision was intended to curtail the intensely coercive tactics used by police officers to elicit confessions from suspects who were "in custody or otherwise deprived of [their] freedom of action in any significant way." *Id.*, at 445. The Court prefaced its decision by noting that "[a]n understanding of the nature and setting of this in-custody interrogation is essential to our decisions today." *Ibid.* It then described such third-degree tactics as "beating, hanging, [and] whipping" and cited a recent New York case in which "police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party." *Id.*, at 446.

Such techniques, although undoubtedly exceptions to the rule, were "sufficiently widespread to be the object of concern." *Id.*, at 447. The Court felt that "[u]nless a proper limitation

upon custodial interrogation is achieved . . . there can be no assurance that practices of this nature will be eradicated in the foreseeable future." *Ibid.* The decision, however, focused more on psychological police tactics than on physical brutality in determining the potential for coercion. See *id.*, at 448, 455-456.

The environment in which a suspect is placed is a decisive factor in evaluating coercion. As both the police manuals and this Court emphasized, privacy is of utmost importance in eliciting a confession. *Id.*, at 449-451. While held in solitary detention, the pre-*Miranda* suspect was interrogated, sometimes for days, "with no respite from the atmosphere of domination." *Id.*, at 451. Regardless of the method of interrogation, the overriding constant is the restriction on the suspect's freedom to leave.

It was during this state of the law, in which an uneducated, perhaps mentally disturbed suspect with no knowledge of his constitutional rights, could be arrested, isolated, and interrogated until he confessed, that *Miranda* was decided. Although the Court noted that such confessions may not necessarily be involuntary "in traditional terms," warnings were required, given the "compulsion inherent in custodial surroundings . . . ." *Id.*, at 457-458.

It bears noting what type of custodial interrogation the four petitioners in *Miranda* underwent. Petitioner Vignera was "picked up" by police and taken to the police station; the others were formally arrested prior to interrogation. *Id.*, at 491-497. Present in all cases were "salient features—incommunicado interrogation of individuals in a police-dominated atmosphere . . . ." *Id.*, at 445. It was this type of inherently coercive questioning the Court sought to regulate.

Prior to *Miranda*, the admissibility at trial of a defendant's statement to the police was a due process issue that depended on whether the statement was voluntary under the totality of the circumstances. *Michigan* v. *Tucker*, 417 U. S. 433, 441 (1974). Following *Miranda*, the issue was whether a suspect had been given the prescribed warnings under appropriate circumstances. Hence, the coexistence of custody and interrogation emerged as the main point of contention in determining the admissibility of a confession.

Although the focus has shifted, the rationale for exclusion remains the same. Under either inquiry, official coercion is the danger which exclusion seeks to remedy; where such coercion is not present, the rationale for exclusion is weak and serves more to impede the fact-finding process than to protect constitutional rights.

To qualify for exclusion, a confession must be the product of official compulsion. The absence of "the essential link between coercive activity of the State . . . and a resulting confession by the defendant" removes a confession from the category of inadmissible evidence under either a due process or a *Miranda* analysis. *Colorado* v. *Connelly*, 479 U. S. 157, 165-167, 170 (1986). Thus, the confession of an insane man is not excluded by the *Miranda* rule, even if he is compelled by inner voices to confess, as long as the voices are not those of law enforcement. *Id.*, at 170-171. "Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions." *United States* v. *Washington*, 431 U. S. 181, 187 (1977).

Coercion is generally not presumed; it is the "interaction of custody and official interrogation" that warrants a presumption of compulsion. *Illinois* v. *Perkins*, 496 U. S. 292, 297 (1990). That a confession was unwarned is by itself insufficient to evoke the presumption. *Elstad*, *supra*, 470 U. S., at 314.

"A *Miranda* violation does not *constitute* coercion, but rather affords a bright-line, legal presumption of coercion . . . ." *Id.*, at 307, n. 1 (emphasis in original). The type of custody required to implicate *Miranda* must be of the sort that will enable the court to presume coercion. This is why an officer's intentions to arrest the suspect are only relevant if they are communicated, otherwise, it does not affect how a reasonable person in the suspect's situation would view his freedom. *Stansbury* v. *California*, 128 L. Ed. 2d 293, 299-300, 114 S. Ct. 1526, 1529-1530 (1994) (*per curiam*).

Although the presence of coercion may render a confession involuntary under due process considerations, it alone does not implicate *Miranda*. Any interview with a suspect will contain elements of coercion. *Oregon* v. *Mathiason*, 429 U. S. 492, 495 (1977) (*per curiam*). "*Miranda* warnings are required only

where there has been such a restriction on a person's freedom as to render him 'in custody.' It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited." *Ibid.* (emphasis in original).

In cases in which a suspect has voluntarily agreed to answer questions and subsequently attempted to suppress the answers, this Court has uniformly held, with no more than a cursory discussion of what constitutes custody, that no warnings are required. *California* v. *Beheler*, 463 U. S. 1121, 1124 (1983) (*per curiam*); *Mathiason*, *supra*, 429 U. S., at 495; *Roberts* v. *United States*, 445 U. S. 552, 561 (1980).

It is involuntary, coerced statements that this Court sought to exclude via the *Miranda* rule. "The absence of *Miranda* warnings does not, by some mysterious alchemy convert a voluntary and trustworthy statement into an involuntary and unreliable one." *Withrow* v. *Williams*, 123 L. Ed. 2d 407, 430, 113 S. Ct. 1745, 1762 (1993) (O'Connor, J., dissenting). When the evidence weighs heavily against an involuntariness claim, as when a trial court has found the defendant free to leave, a confession should be admitted. Allowing the relitigation of a custody issue the trial court has already ruled on is constitutionally unnecessary and stretches *Miranda* across ground it was never intended to cover.

B. Miranda's Limits and the Definition of Custody.

Miranda reigns within the small and closely guarded territory of custodial interrogation; it is not the governing doctrine outside those borders. This Court has stated that "the decision as written strikes the proper balance between society's legitimate law enforcement interests and the protection of the defendant's Fifth Amendment rights," *Moran* v. *Burbine*, 475 U. S. 412, 424 (1986), and has refused to sanction its expansion. See *New York* v. *Quarles*, 467 U. S. 649, 658 (1984).

The *Miranda* Court was careful to point out what its decision did not encompass. It recognized that "[c]onfessions remain a proper element in law enforcement" and specifically preserved "general questioning of citizens in the fact-finding process" as outside the scope of the decision. *Miranda*, *supra*, 384 U. S., at 477-478. Likewise, the police are free, as part of their

investigation, to conduct "inquiry of persons not under restraint," and any statements one makes while not in custody are admissible, notwithstanding a lack of warnings. *Ibid.*

Generally, when one is questioned by government agents, he is considered to have answered voluntarily unless he claims the Fifth Amendment privilege. See *Minnesota* v. *Murphy*, 465 U. S. 420, 429 (1984). Custodial interrogation is an exception to this rule. *Ibid.* Its warning requirement is an "extraordinary safeguard [which] 'does not apply outside the context of the inherently coercive custodial interrogations for which it was designed.' " *Id.*, at 430 (quoting *Roberts* v. *United States*, 445 U. S. 552, 560 (1980)).

Custodial interrogation is not an arbitrary cutoff point for the requirement of warnings; it is when the "adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system . . . ." *Miranda*, *supra*, 384 U. S., at 477. It was the "incommunicado, police-dominated atmosphere," the "relentless questioning," and "depriv[ation] . . . of any outside support" associated with it that the *Miranda* Court found inherently compelling. *Id.*, at 455-456.

The *Miranda* Court did not provide a bright-line definition of custody. It held that warnings were necessary when the suspect was "in custody at the station or otherwise deprived of his freedom of action in any significant way." *Id.*, at 477. Later cases have defined custody as "whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Beheler*, *supra*, 463 U. S., at 1125 (quoting *Mathiason*, *supra*, 429 U. S., at 495).

In the almost 30 years since the *Miranda* decision, no court has provided a workable, bright-line definition of custody. This Court has, however, more clearly outlined *Miranda*'s boundaries and its applicability. Subsequent decisions have chiseled away at the broad definition of custody and made it more accessible to trial courts. Although there remains a gray area in which the custody determination may be unclear as a matter of law, that area has shrunk to where it is extremely fact-specific.

One case which significantly limited the definition of custody is *Berkemer* v. *McCarty*, 468 U. S. 420 (1984), in which the Court held that a traffic stop, although a seizure, does not

amount to custody for the purposes of *Miranda*. *Id.*, at 440. The Court indicated that *Miranda* was to be strictly enforced, "but only in those types of situations in which the concerns that powered the decision are implicated." *Id.*, at 437. Although he was certainly subjected to "some pressure," the suspect was not "completely at the mercy of the police," and warnings were unnecessary. *Id.*, at 438.

This Court has laid down other bright-line rules excluding certain situations from the definition of custody. A prison inmate is under no compulsion and therefore not in custody for purposes of *Miranda* when the interrogator is an undercover police officer posing as a fellow inmate. *Illinois* v. *Perkins*, 496 U. S. 292, 296 (1990). A witness before a grand jury is also not in custody while testifying, even if that witness is a suspect in the investigation. *United States* v. *Mandujano*, 425 U. S. 564, 580 (1976).

The Court has also furnished bright-line rules requiring a finding of custody under certain circumstances. Once a suspect has been arrested, he is in custody for *Miranda* purposes, regardless of where the arrest takes place. See *Orozco* v. *Texas*, 394 U. S. 324, 327 (1969). A suspect in custody for any crime may not be interrogated, even on a completely unrelated crime, without first being advised of his rights. *Mathis* v. *United States*, 391 U. S. 1, 4-5 (1968).

In other areas, this Court has declined to draw bright lines within the definition of custody, presumably so as to not unduly restrict it. The questioning of a suspect at the police station, although admittedly coercive, does not amount to custody where the suspect's freedom to leave is not restricted. *Oregon* v. *Mathiason*, 429 U. S. 492, 495 (1977) (*per curiam*); see also *California* v. *Beheler*, 463 U. S. 1121, 1125 (1983) (*per curiam*). A meeting with one's probation officer does not necessarily place a suspect in custody, although it could, depending on the circumstances. *Minnesota* v. *Murphy*, 465 U. S. 420, 429, n. 5, 433 (1984).

Most of the limitations on the need for *Miranda* warnings work to preserve the clarity of the decision and make it easier for police officers and courts to follow its mandate. See *Berkemer*, *supra*, 468 U. S., at 430. Others provide guidelines for lower

courts while allowing for flexibility. What has emerged is an area of the law with brightly delineated borders, within which it is murky and necessarily fact-specific.

C. Custody as a Preliminary Question of Fact.

The issue of custody is entirely dependent on factual determinations which, because of the variety of possible police encounters, do not conform to the type of generalization necessary for a single bright-line rule covering all situations. Unlike that of voluntariness, the concept of custody under *Miranda* does not require an appellate court's application of law in numerous cases to derive its meaning. Custody is usually an easy question. When it is not, the trial judge's ruling should be accorded deference. The issue of custody is similar to other questions of fact which are routinely decided by trial judges and reviewed for clear error. It is not a proper subject for continuous relitigation.

1. A fact-specific determination.

Although *Miranda* is a bright-line rule in that it automatically excludes unwarned statements given during custodial interrogation, the issue of custody, with its many variables, is not such a rule. Because there are a potentially unlimited number of police-suspect encounters that are in some way atypical, there will always be a class of cases where the determination of whether a particular encounter constitutes custody must be made on an individual basis.

In the usual and most common scenario, a suspect is arrested, often pursuant to a warrant, and taken to the police station for questioning. There is no doubt that the suspect is in custody. It was in these situations, particularly where interrogation was prolonged and the suspect completely "cut off from the outside world," that the voluntariness of a confession was questionable and for which *Miranda* was instituted. *Miranda* v. *Arizona*, 384 U. S. 436, 445 (1966).

When the facts, as in the present case, do not fit neatly into this archetype, the necessity for warnings is less clear. Before determining if *Miranda* should operate to exclude any statements, a court must first determine if the decision was implicated: it must determine if the suspect was in custody.

This Court has held that where there are many possible factual variations on a given problem, such that generalization under a particular rule is difficult or impossible, the issue should be decided by a trial judge. Cf. *Pierce* v. *Underwood*, 487 U. S. 552, 562 (1988) (trial court's determination of whether a legal position was "substantially justified" reviewed for abuse of discretion). When an issue is heavily fact-dependent, the trial court's ruling should be reviewed deferentially, even when that ruling involves the application of a legal standard. See *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 402-403 (1990).

In *Cooter & Gell*, this Court held that, although the applicability of Rule 11 sanctions is categorized as a question of law, in practice it is properly an issue for the trial court because it involves many " 'fact-intensive, close calls' " and because it requires a judgment on the issue of reasonableness. *Id.*, at 404-405. The fact that leaving the issue to the trial judge could lead to differing outcomes was not dispositive; the Court accepted that "some variation in the application of a standard based on reasonableness is inevitable. 'Fact-bound resolutions cannot be made uniform through appellate review, *de novo* or otherwise.' " *Id.*, at 405.

The issue of custody is, like the imposition of sanctions in *Cooter & Gell*, a fact-intensive inquiry which requires a judge to determine what is reasonable. Because this Court cannot possibly account for every encounter between a suspect and a police officer and assign to it a bright-line rule, it must at some point delegate the task of applying the rule to the trial court.

Assigning the custody decision to a trial judge will not preclude reversal of an erroneous ruling by the trial judge. Where the trial court has made a legal or factual error, review remains available, even if not *de novo*.

As this Court stated in entrusting the trial court with meting out sanctions, an appellate court can still correct legal errors. *Id.*, at 402. The standard of review on appeal for questions of fact is "clearly erroneous," see *id.*, at 400; it is not insurmountable. When the trial judge has obviously erred in admitting a confession, a reviewing court can overturn the decision on

appeal or on habeas. The "clearly erroneous" standard merely ensures that the trial court's determination of the custody issue will be accorded deference.

Allowing the trial judge to determine the issue of custody will not threaten a defendant's constitutional rights; custody by itself is not a constitutional issue. *Miranda* operates as a safeguard to narrowly protect the Fifth Amendment right against self-incrimination; the warnings themselves are not constitutionally required. *New York* v. *Quarles*, 467 U. S. 649, 654 (1984); *Michigan* v. *Tucker*, 417 U. S. 433, 444 (1974).

Miranda serves as a buffer zone to protect Fifth Amendment rights. Whether a defendant was in custody prior to confessing is a threshold question used in determining whether *Miranda* warnings were necessary, which is a prophylactic means of excluding a suspect's involuntary confession. When custody is questionable, its determination is two steps removed from the core constitutional issue of whether the defendant was compelled to incriminate himself. Cf. *Davis* v. *United States*, 129 L. Ed. 2d 362, 373, 114 S. Ct. 2350, 2357 (1994) (declining to "create a third layer of prophylaxis . . . when the suspect *might* want a lawyer").

Making custody a question of fact will not increase the risk of admission of an involuntary statement. When the existence of custody is unclear, voluntariness is typically a nonissue; where the defendant was arguably free to leave, there is little support for a claim of involuntariness and even less for *Miranda*'s conclusive presumption to that effect. In the rare case in which such an argument is not frivolous, the defendant can still argue involuntariness, which is reviewed *de novo*, apart from any *Miranda* claim. *Beckwith* v. *United States*, 425 U. S. 341, 347-348 (1976).

2. Distinguished from voluntariness.

It must be remembered that *Miranda* was intended to replace the difficult voluntariness test as the means by which trial courts ruled on the admissibility of confessions. It was not intended to replace voluntariness as a source of confusion. Yet, this is what it does if custody is constantly relitigated on appeal and habeas.

In shifting the focus from voluntariness to the *Miranda* rule, the Court turned a complex legal analysis into a fact-based inquiry. If *Miranda* is to simplify the law for police and courts while safeguarding the rights of suspects, trial judges should be allowed to determine when a suspect is in custody and in need of warnings.

To reiterate, one of the driving forces behind the *Miranda* decision was avoidance of the problematic "voluntariness" test. As one commentator stated, in enumerating the many problems with the pre-*Miranda* voluntariness or totality of the circumstances test, "[a]lmost everything was relevant, but almost nothing was decisive." Kamisar, "Probable Cause," "Good Faith," and Beyond, 69 Iowa L. Rev. 551, 570 (1984). Making custody a question of law would only lower the veil of uncertainty and indecisiveness that *Miranda* sought to lift.

In voluntariness cases, "the relevant legal principle can be given meaning only through its application to the particular circumstances of a case . . . ." *Miller* v. *Fenton*, 474 U. S. 104, 114 (1985). Courts still use the "totality of the circumstances" approach to make the determination. *Withrow* v. *Williams*, 123 L. Ed. 2d 407, 417, 420, 113 S. Ct. 1745, 1751 (1993). This lack of specificity requires the rule to evolve through appellate court decisions. In such situations, this Court is reluctant to deprive the reviewing court "of its primary function as an expositor of law." *Miller*, 474 U. S., at 114.

Custody does not derive its meaning through appellate decisions. It is usually a clear-cut, unambiguous issue that requires no more than a cursory determination by the trial judge. *Ante*, at 10. Only the relatively rare situations which fall in the "gray area" are subject to dispute. The existence of these cases does not warrant continuous reshaping by appellate courts.

A second reason for *Miller* is that voluntariness goes to the heart of the Due Process Clause, and must necessarily be reviewed independently. *Haynes* v. *Washington*, 373 U. S. 503, 515 (1963). Issues such as the voluntariness of a confession, which directly implicate constitutional rights, are reviewed *de novo*. *Watts* v. *Indiana*, 338 U. S. 49, 51 (1949). The voluntariness of a confession was thought to be too important an issue to be left to trial judges.

Unlike the issue of voluntariness, custody is not of sufficient constitutional importance to require independent review. That unwarned confessions are less constitutionally significant than involuntary ones is evidenced by the use to which they may be put. Statements which violate *Miranda* may be used for impeachment purposes. *Harris* v. *New York*, 401 U. S. 222, 226 (1971). They do not taint a later, warned confession, *Oregon* v. *Elstad*, 470 U. S. 298, 312-314 (1985), and they are admissible for any purpose where exigent circumstances necessitated the interrogation. *New York* v. *Quarles*, 467 U. S. 649, 655-656 (1984). In contrast to *Miranda* violations, "involuntary or compelled statements . . . are . . . inadmissible for any purpose." *Withrow* v. *Williams*, 123 L. Ed. 2d 407, 426, 113 S. Ct. 1745, 1759 (1993) (O'Connor, J., dissenting).

Custis v. *United States*, 128 L. Ed. 2d 517, 528, 114 S. Ct. 1732, 1738 (1994) is somewhat analogous here. Cases permitting collateral attack on prior convictions for *Gideon* error did not need to be extended to less fundamental claims. Similarly, *Miranda* claims are qualitatively less fundamental than voluntariness claims, and their determination can be given greater finality.

In determining that the voluntariness of a confession should be a question of law, the *Miller* Court centered on precedent. First and foremost, because prior Supreme Court decisions have treated the voluntariness issue as one of law, making it an issue of fact would require overruling past decisions, something the Court was very reluctant to do. *Miller*, *supra*, 474 U. S., at 115.

No such considerations underlie the issue of custody; this Court is writing on a clean slate. Because *Miranda* is relatively recent and this Court has never determined whether custody is an issue of fact or law, there is no tradition to be dispensed with or adhered to. As this Court has never spoken on the legal standard to be given custody, and the lower courts are divided, this Court would merely be clarifying, not changing, the law by making custody a question of fact.

Along similar lines, *Miller* found that Congress had acted in reliance on the status of voluntariness as a question of law in the 1966 amendment to the habeas statute, 474 U. S., at 115, but the

situation with *Miranda* and custody is quite different. *Miranda* was a new decision in 1966. There was no established body of case law to rely on. The only act of Congress dealing with *Miranda* is 18 U. S. C. section 3501, which seems to abrogate the decision altogether. See *Davis* v. *United States*, 129 L. Ed. 2d 362, 375, 114 S. Ct. 2350, 2358 (1994) (Scalia, J., concurring). Whatever the effect of this statute, it cannot seriously be contended that Congress has endorsed *Miranda* or required that it be a more fertile ground for reversals than is absolutely necessary.

The Ninth Circuit recognized the distinction between the voluntariness of a confession and whether a suspect is in custody for *Miranda* in the very case petitioner asks this Court to overrule: *Krantz* v. *Briggs*, 983 F. 2d 961 (1993). Krantz argued that custody should be a question of law, citing precedent that the voluntariness of a confession or a waiver of *Miranda* rights was a question of law. The Ninth Circuit acknowledged that *de novo* review was proper in the cited situations, but distinguished the issue of custody as a factual determination. *Id.*, at 963; accord *People* v. *Mickey*, 54 Cal. 3d 612, 649, 818 P. 2d 84, 99 (1991) (Mosk, J., unanimous).

In *Miller* v. *Fenton*, 474 U. S. 104 (1985), this Court acknowledged that there is no foolproof method of distinguishing a factual question from a legal one, *id.*, at 113, but it did offer some guidance. It stated that when the issue lies "somewhere between a pristine legal standard and a simple historical fact," the determination is often made by allocating the function of deciding the issue to the legal entity that is better equipped to make it. *Id.*, at 114.

Custody, like voluntariness, lies in this border zone where a detached analysis of whether factual or legal issues predominate could arguably go either way. Custody, however, does not carry the same historical baggage that *Miller* found decisive to voluntariness. Comparing custody with other baggage-free issues, we find that it resembles those that have been found to be questions of fact.

3. Other questions of fact.

Custody is not an issue that must be decided by every court that encounters it on review; like so many other issues that are routinely decided by trial courts, it is merely a factual component of an ultimately legal question. It is remarkably similar to the many issues that a trial judge must determine as a matter of fact and should be reviewed under the same standard.

The competency of a defendant to stand trial is a question of fact for the trial court and subject to the presumption of correctness under 28 U. S. C. § 2254(d). *Maggio* v. *Fulford*, 462 U. S. 111, 117-118 (1983) (*per curiam*). So is a defendant's competence to withdraw a habeas petition. *Demosthenes* v. *Baal*, 495 U. S. 731, 735 (1990) (*per curiam*). This is because the trial court's opportunity to personally observe the witnesses, particularly defendant, is an important factor in making these determinations. *Id.*, at 737; *Fulford*, 462 U. S., at 117-118.

The inferences which trial courts make based on their findings of fact are also entitled to a presumption of correctness on habeas or on appeal, even when the ultimate issue is one of law. *Marshall* v. *Lonberger*, 459 U. S. 422, 435 (1983) (voluntariness of guilty plea). The characterization of an event can also be an issue of fact, even where it is the ultimate issue in the case. When a trial court in a tax case found defendant's cruise to have been a pleasure trip, this Court upheld the characterization, stating that "such ultimate facts are subject to the 'clearly erroneous' rule." *Rudolph* v. *United States*, 370 U. S. 269, 270 (1962) (*per curiam*).

A finding which must be made before a conclusive presumption attaches is a finding of fact. See *Ulster County Court* v. *Allen*, 442 U. S. 140, 156 (1979) (explaining "basic" and "ultimate" facts). The underlying assumptions created by virtue of the presumption are also factual. See *ibid.*

Although the voluntariness of a guilty plea is a question of law on which a reviewing court may rule *de novo*, the findings underlying this determination are questions of fact. *Lonberger*, *supra*, 459 U. S., at 431-432. Such findings include the level of intelligence of defendant, how experienced he is with the criminal justice system, and how well he was represented by counsel. *Id.*, at 435; see also *Parke* v. *Raley*, 121 L. Ed. 2d

391, 408, 113 S. Ct. 517, 527 (1992) (presumption of correctness accorded to facts underlying prior conviction).

Even the voluntariness of a confession is only a question of law after all the underlying facts have been found; all of the circumstances to which the judge must look in making the determination are factual issues. *Miller*, *supra*, 474 U. S., at 117. The Court stressed that subsidiary questions such as "the length and circumstances of the interrogation, the defendant's prior experience with the legal process, and familiarity with the *Miranda* warnings" were factual issues which were "conclusive." *Ibid.*

In federal cases, the trial court must determine the admissibility of evidence pursuant to Rule 104 of the Federal Rules of Evidence. Thus, the relevance of the evidence is determined by the trial court. *Hamling* v. *United States*, 418 U. S. 87, 124-125 (1974). The reliability of evidence is also determined by the trial court, even when it requires an in-depth assessment of the validity of expert testimony and its applicability to the facts at hand. *Daubert* v. *Merrell Dow Pharmaceuticals*, 125 L. Ed. 2d 469, 482, 113 S. Ct. 2786, 2796 (1993).

The determination of whether a defendant was in custody is, like the determination of the relevance or reliability of a piece of evidence, a preliminary fact that must be decided before the evidence may be admitted. When that piece of evidence is a pretrial statement by the defendant, the custody issue is a precursor to determining whether *Miranda*'s conclusive presumption applies.

Continuous relitigation of the custody issue thwarts the very purpose of *Miranda*. By reviewing custody issues *de novo*, courts are replacing the confusion surrounding whether or not a confession was voluntary with the confusion over whether the confessor was in custody. If courts are going to routinely review the admissibility of confessions *de novo*, they may as well revert back to the voluntariness test. If, however, *Miranda* is to remain a part of the law of criminal procedure, it should be a workable rule that serves its intended purpose. The issue of custody should be decided by a trial judge and reversed only for clear error.

D. Withrow Concerns.

This Court recently refused to extend *Stone* v. *Powell*, 428 U. S. 465 (1976), which barred habeas review of most Fourth Amendment claims, to include *Miranda* claims. *Withrow* v. *Williams*, 123 L. Ed. 2d 407, 413, 113 S. Ct. 1745, 1748 (1993). The most important reason cited for this holding was the finding that barring collateral review of claimed *Miranda* violations would not reduce the burden on habeas courts because prisoners could simply recast their *Miranda* claims as involuntariness claims. *Id.*, at 420, 113 S. Ct., at 1754.

Amicus will not ask the Court to overrule this recent decision, although one point does bear mention. The facts of the present case illustrate perfectly the fallacy of *Withrow*'s fear that barred *Miranda* claims will simply be recast as involuntariness claims, and that deciding those claims will be as much of a burden as deciding the *Miranda* claims. See *ibid*. Absent any overt coercion, when the custody question is close the voluntariness question is typically not.

Thompson *did* make an involuntariness claim in the present case, and neither the state nor federal appellate court deemed it worthy of more than cursory discussion. *Thompson* v. *State*, 768 P. 2d 127, 131-132 (Alaska Ct. App. 1989); *Thompson* v. *Keohane*, No. 94-35052 (CA9, Aug. 11, 1994) pp. 2-3 (unpublished), App. to Pet. for Cert. Thus the *Miranda* issue is pure excess baggage, in addition to the involuntariness claim and not a substitute for it. Further, the custody question is the only issue presenting any difficulty in an otherwise simple case of a clearly guilty, properly tried murderer.

Even accepting *Withrow* as precedent, that decision does not stand in the way of this Court's denying independent review to custody issues. Making custody a question of fact will actually help alleviate some of the problems this Court foresaw in *Withrow* by limiting the number of meritless involuntariness claims.

A successful involuntariness claim requires some element of government coercion. *Colorado* v. *Connelly*, 479 U. S. 157, 165-166 (1986). That element is most likely missing where the element of custody, as found by the trial court, is also absent. As the facts of the present case amply demonstrate, when the

issue of custody is subject to debate, an involuntariness claim typically borders on the frivolous.

II. If custody is to be a question of law, the definition of custody should require a seizure.

Petitioner has chosen to brief the issue of whether he was in custody rather than remand it to the Ninth Circuit. Brief for Petitioner 43. In doing so, petitioner has raised the issue of this Court's clarifying the definition of custody "to provide additional guidance to the lower courts in the application of the 'custody' standard." *Ibid*.

If this Court decides that custody should be resolved as a question of law such that it is subject to review *de novo* on both appellate and habeas review, *amicus* requests that it further hone the definition of custody. If custody is to be a question of law, its definition should be more accessible; the line between custodial and non-custodial interrogation should be brighter. If custody must be a question of law, it should be restricted to those situations in which the suspect has been seized by the police.

Making seizure of the suspect a prerequisite to a finding of custody will provide more guidance to police officers and courts, and will benefit suspects and defendants with more uniform applications of the law. Enhancing the brightness and clarity of the rule by requiring a seizure will make *Miranda* a more effective tool for the protection of Fifth Amendment rights.

A. The Value of a Bright-Line Rule.

Under *Miranda*, once a suspect is found to have been subjected to custodial interrogation, the only relevant inquiry is whether he was informed of his constitutional rights. A lack of warnings furnishes a conclusive presumption of coercion and all unwarned statements are excluded, regardless of how weighty the evidence that they were voluntary. See *Miranda* v. *Arizona*, 384 U. S. 436, 458 (1966).

The *Miranda* Court recognized that not all unwarned custodial interrogations would result in confessions which were "involuntary in traditional terms." *Id.*, at 457. The decision,

however, was intended to "give concrete constitutional guidelines for law enforcement agencies and courts to follow." *Id.*, at 441-442. The *Miranda* warnings obviated the need for a case-by-case analysis of whether a particular suspect was aware of his constitutional rights; such an analysis could only be "speculation," whereas "a warning is a clearcut fact." *Id.*, at 469.

Bright-line confession rules, when properly placed, reduce the risk of error involved in a case-by-case analysis. However, such rules, particularly when they are prophylactic in nature, unavoidably result in the suppression of constitutionally admissible evidence. Dix, Promises, Confessions, and Wayne LaFave's Bright Line Rule Analysis, 1993 U. Ill. L. Rev. 207, 230-231 (1993). Professor LaFave himself had this to say about bright-line rules:

> "as between a complicated rule which in a theoretical sense produces the desired result 100% of the time, but which well-intentioned police could be expected to apply correctly in only 75% of the cases, and a readily understood and easily applied rule which would bring about the theoretically correct conclusion 90% of the time, the latter is to be preferred over the former." LaFave, The Fourth Amendment in an Imperfect World: On Drawing 'Bright Lines' and 'Good Faith', 43 U. Pitt. L. Rev. 307, 321 (1982).

The advantages to bright-line rules regarding police conduct are twofold. First, they make more sense to police officers who are thus more likely to act properly. The law, it has been stated, "cannot realistically require that policemen investigating serious crimes make no errors whatsoever." *Michigan* v. *Tucker*, 417 U. S. 433, 446 (1974). Hence, the need is for a "workable rule" to reduce the "on-the-scene balancing" required of police officers. *New York* v. *Quarles*, 467 U. S. 649, 658 (1984). Given the multitude of different ways police interact with citizens, a bright-line rule is required for an officer to accurately determine the necessity of a warning so that relevant evidence may be accessed without incurring the risk of later inadmissibility.

Second, a bright-line rule is more manageable in the courts; it reduces the litigation associated with its application and promotes fairness. Dix, *supra*, 1993 U. Ill. L. Rev., at 229. In

determining admissibility, the trial court requires a clear, easily applied rule. If the standard is fuzzy, a court may improperly exclude evidence, resulting in the release of defendants who would be convicted under its proper application. Because the state generally may not appeal such a ruling, it is important that the trial court get it right the first time. The surest way is through a bright-line rule.

Yet, there are costs associated with *Miranda*'s bright-line rule. The evidence excluded is not always constitutionally inadmissible. *Oregon* v. *Elstad*, 470 U. S. 298, 306 (1985). In fact, requiring the warnings in every case excludes "trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis." *Fare* v. *Michael C.*, 442 U. S. 707, 718 (1979). Although the "gain in specificity" is said to "outweigh the burdens" associated with the rule, this is only true where *Miranda* stays within its prescribed boundaries. See *id.*, at 718-719. As Justice Cardozo's oft-quoted statement notes, "justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder* v. *Massachusetts*, 291 U. S. 97, 122 (1934).

Conclusive presumptions are so inherently unfair that this Court has categorically banned their use against defendants. See *Sandstrom* v. *Montana*, 442 U. S. 510, 523 (1979). If we are to keep the balance true, a presumption against the people should, at the very least, be confined to circumstances where the fact presumed follows from the fact proven more likely than not. See *Leary* v. *United States*, 395 U. S. 6, 36 (1969); *Ulster County Court* v. *Allen*, 442 U. S. 140, 166 (1979) (standard for permissive presumptions against defendant).

The defendant is not the only party who suffers an injustice when the standard for admission or exclusion of evidence is improperly applied. When a reliable and voluntary confession is excluded from evidence, such that an admittedly guilty person is unleashed upon society, an injustice is done. This injustice is exacerbated if it is not due to the constable's blunder, but to the failure of the courts to clearly define the constable's duties under an ever-changing application of law.

If the purpose of *Miranda* is to guide both police officers and courts by replacing case-by-case decision making in the area of confessions, then the determination of whether a suspect was in custody should be more accessible. If evidence is to be excluded from the trial because of something the police did or failed to do, the boundaries between permissible and impermissible conduct should not be faintly drawn. Exclusion should be strictly limited to situations involving clearly custodial interrogation, and the rationale behind *Miranda* as a bright-line rule should be honored scrupulously. This can be accomplished by making seizure a requirement for the finding of custody that implicates *Miranda*.

B. Coercion, Compulsion, and Custody.

"Compel" means "[t]o necessitate or pressure by force." American Heritage Dictionary 385 (3d ed. 1992). "Coerce" means "[t]o force . . . or . . . compel." *Id.*, at 367. The essence of each is that a person is convinced by the application of force to do that which he would ordinarily avoid. The pressure may be psychological or physical.

The psychological pressure which leads to the automatic exclusion of evidence under *Miranda* is only presumed from the interaction of custody and interrogation; it is not presumed from the fact of a confession or from the presence of the suspect at the police station. *Ante*, at 6, 9. The custody and its resultant coercion must both be the products of government action; some action on the part of the police that is sufficiently coercive to be termed custody is necessary. *Colorado* v. *Connelly*, 479 U. S. 157, 170 (1986).

The coercion *Miranda* prohibits does not include that experienced by the guilty person who, upon being confronted with the gravity of his crime, feels compelled by his own conscience to confess. One's conscience, like an insane person's inner voices, does not implicate *Miranda* or any constitutional rights, regardless of its insistence. See *id.*, at 170-171. "This Court has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion . . . ." *Elstad*, *supra*, 470 U. S., at 312.

The actual perpetrator of the crime may often fear that his identity will be discovered, particularly while in the presence of police officers, and particularly while being questioned as to the extent of his knowledge about the crime. This is not necessarily custody, and it is not presumptively coercive. When the perpetrator of a crime voluntarily goes to the police station to answer questions for the purpose of averting suspicion from himself, *Miranda* does not apply. It perverts our system of justice to allow a murderer who voluntarily talks to the police, and perhaps even lies or implicates an innocent party, to later exclude any statements on the basis that he was not advised of his rights.

That a suspect does not immediately confess upon entering the police station, but does so following a lengthy dialogue, is insufficient to warrant a presumption of coercion in the absence of evidence that he was not free to leave. *Miranda* does not protect people against making choices that are against their penal interests; it protects them against the type of official coercion that leaves them with "no choice but to submit . . . ." *Minnesota* v. *Murphy*, 465 U. S. 420, 433 (1984). "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Miranda*, *supra*, 384 U. S., at 478.

The essential predicate of the warning requirement is the "compulsion inherent in custodial surroundings." *Id.*, at 458. It is the restraint on physical freedom that forms the basis for the psychological pressure "to speak where [one] would not otherwise do so freely." *Id.*, at 467. For purposes of defining custody, the emphasis must be on the degree to which one is deprived of his physical freedom. If a suspect has not been seized, no coercion should be presumed and *Miranda* warnings should not be necessary.

C. Seizure: A Necessary but not Sufficient Requirement.

Seizure and custody employ a common theme, that of physical or authoritative restraint. "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a seizure has occurred." *Terry v. Ohio*, 392 U. S. 1, 19, n. 16 (1968). Custody requires that one be "significantly deprived of his

freedom of action." *California* v. *Beheler*, 463 U. S. 1121, 1123 (1983) (*per curiam*).

This Court has decided against restricting *Miranda* to situations in which the defendant has been formally arrested. Although doing so would provide a bright-line rule and make *Miranda* easier for police officers and courts to administer, the Court feared that it would enable police to entirely circumvent the decision. *Berkemer* v. *McCarty*, 468 U. S. 420, 441 (1984). However, custody is defined as the restraint on freedom of the "'degree associated with formal arrest.' " *Id.*, at 440 (quoting *Beheler*, *supra*, 463 U. S., at 1125). If this Court is to continue to so define custody, yet refrain from drawing the line at a formal arrest, it should at least require a seizure.

1. Seizure defined.

The most recent and most thorough definition of seizure under the Fourth Amendment is found in *California* v. *Hodari D.*, 499 U. S. 621 (1991). Two police officers chased Hodari as he fled through an urban area. As he ran, Hodari threw away a small rock of crack cocaine. A moment later, an officer tackled Hodari and handcuffed him. *Id.*, at 623. The issue was at what point Hodari had been seized for purposes of excluding or admitting the drugs. *Ibid.*

The Court held that he had not been seized prior to throwing away the drugs, as he had not yielded to authority. It was only when Hodari was tackled that he was seized for Fourth Amendment purposes. *Id.*, at 626. A seizure requires either physical force or submission to a show of authority. A mere show of authority by the police officer does not constitute a seizure unless the suspect yields to it. *Ibid.*

Prior to *Hodari D.*, this Court decided *Brower* v. *Inyo County*, 489 U. S. 593 (1989). The driver of a stolen car crashed into a police roadblock which had been set up in the path of his flight. *Id.*, at 594. The Court held that he had been seized at the time of the crash, even though he had had ample opportunity to stop on his own. *Id.*, at 598-599.

The key to the finding of seizure was the intent behind the police actions which ultimately produced Brower's detention. A seizure is only effected "when there is a governmental termination of freedom of movement *through means intentionally applied*." *Id.*, at 597 (emphasis in original). Had Brower merely lost control of the vehicle while being pursued, his subsequent crash would not have amounted to a seizure because it would have been effected through means different from those intentionally applied. *Ibid.*

Taken together, *Hodari D.* and *Brower* provide a clear definition of seizure. First, the police must intend to terminate an individual's freedom of movement through some means or instrumentality. Second, the individual must either be restrained by that method or submit to its assertion of authority. The person is seized only if both conditions are satisfied.

2. Beyond seizure.

Just as the definition of "seizure" has been sharpened by the Court to encompass only purposeful, effective assertions of authority, so too should the definition of custody. Without some manner of actual restraint on physical freedom, purposefully directed toward the suspect by the police, any compulsion will not rise to the level of a Fifth Amendment violation. *Miranda* warnings should thus only be required once a suspect has been seized as defined in Fourth Amendment cases.

Although the custody analysis should only begin once the suspect has been seized, it should not end there; something more than a mere seizure is required for a suspect to be in custody. This Court has so indicated in *Berkemer*, in which it held that a traffic stop, although a Fourth Amendment seizure involving detention of the driver and passengers following submission to a show of authority, did not amount to custody for *Miranda* purposes. *Berkemer*, *supra*, 468 U. S., at 436-437, 440.

The two critical factors in the Court's *Berkemer* analysis were duration and intimidation. First, the Court noted that the duration of a traffic stop is generally "temporary and brief." *Id.*, at 437. A motorist so detained can typically expect to have to answer several questions and perhaps wait while the officer verifies the license and registration. *Ibid.* This type of questioning is markedly different from custodial interrogation "which frequently is prolonged, and in which the detainee often is aware

that questioning will continue until he provides his interrogators the answers they seek." *Id.*, at 438.

Second, the attendant circumstances surrounding a typical traffic stop are such that the individual does not feel "completely at the mercy of the police." *Ibid.* Although a police officer exudes an aura of authority and is able, by virtue of this authority, to "exert some pressure on the detainee to respond to questions," this does not rise to the level of custody. *Ibid.* The typical traffic stop is "substantially less 'police dominated' than that surrounding the kinds of interrogation at issue in *Miranda* itself . . . ." *Id.*, at 438-439 (citation omitted).

Seizure is thus a necessary but not sufficient condition for custody; it alone does not exert the kind of compulsion that *Miranda* sought to alleviate. Because custody is based on what a reasonable person would have understood, it should require a seizure plus some objective manifestations that the seizure is likely to continue for more than a brief period. Based on *Berkemer*, that something more must convey elements of detention and intimidation.

The element of detention tells the suspect and reasonable person that he is not facing a temporary delay, but a more prolonged one which he is powerless to end. The element of intimidation seems to follow from the element of detention; it tells the suspect and reasonable person that he is at the mercy of the police.

Custodial interrogation implies that questioning will continue until the suspect confesses. This is what makes it coercive. It is the "pressure on a suspect who is painfully aware that he literally cannot escape a persistent custodial interrogator." *Minnesota* v. *Murphy*, 465 U. S. 420, 433 (1984). Unless the compulsion rises to this level, *Miranda* is inapplicable. Unless the suspect has been seized such that his freedom has somehow been restricted, any compulsion will not be of the sort that implicates *Miranda*. For this reason, and to provide a bright line for police officers and trial courts to follow, custody for *Miranda* purposes should require a Fourth Amendment seizure.

III. If Congress passes habeas reform before this case is argued, supplemental briefing should be taken on the effect of that legislation.

To reach his goal of *de novo* review of the custody question, petitioner's argument must clear three hurdles: (1) that custody is a question of law, not fact; (2) that *Miranda* issues are governed on habeas by the general rule for constitutional claims, and not the "full and fair" standard of *Stone* v. *Powell*, 428 U. S. 465 (1976); and (3) that the general rule is *de novo* review.

The first hurdle is the issue briefed in Part I, *ante*. The second hurdle was the question in *Withrow* v. *Williams*, 123 L. Ed. 2d 407, 113 S. Ct. 1745 (1993). The third hurdle is the general rule of *de novo* review of question of law that has been followed since *Brown* v. *Allen*, 344 U. S. 443 (1953).

In *Wright* v. *West*, 120 L. Ed. 2d 225, 112 S. Ct. 2482 (1992), this Court grappled with the question of whether the *Brown* rule should continue to apply to mixed questions of law and fact and came to no conclusion. That question is, of course, ultimately for Congress to resolve, cf. *id.*, at 247-248, 112 S. Ct., at 2497-2498 (O'Connor, J., concurring in the judgment), and as of this writing it appears likely that Congress will do so. On February 8, the House voted 291 to 140 to abrogate the *Brown* rule. 141 Cong. Rec. H1427 (vote on Cox Amendment to H.R. 729); *id.*, at H1433 (passed as amended 297 to 132). This question is expected to come to the floor of the Senate shortly.

If the Cox Amendment language, or something similar, becomes law, its application would fall squarely within the question presented here: the standard of review to be applied to the resolution of the questions in this case. The present case would therefore make an ideal vehicle for the prompt resolution of the issues invariably raised by new legislation: validity, retroactivity, and interpretation.

In the event that Congress changes the standard before this case is argued, as seems likely, *amicus* respectfully suggests that the Court call for additional briefing on the point.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

May, 1995

Respectfully submitted,

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